

Modern American Law

*A Systematic and Comprehensive Commentary on the
Fundamental Principles of American Law*

PREPARED BY

JUDGES, MEMBERS OF THE BAR, TEACHERS IN LAW SCHOOLS,
AND WRITERS ON LEGAL SUBJECTS

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BLACKSTONE INSTITUTE
CHICAGO

Modern American Law

LEADING ILLUSTRATIVE CASES

DESCENT AND DISTRIBUTION
WILLS AND ADMINISTRATION
GUARDIAN AND WARD

INSURANCE

PERSONS AND DOMESTIC
RELATIONS

QUASI-CONTRACTS

LANDLORD AND TENANT

TAXATION

VOLUME 21

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GENERAL INTRODUCTION.

Modern American Law is composed of two fundamental parts: Treatises and Cases. The combination and organization of these parts into one system is the distinguishing and characteristic feature of the series.

So important are cases as embodying the sources of the law, that there has grown up a method of teaching, often designated as the "case system." More properly, it is the inductive method of education. This method consists of the development of general principles by the study of numerous concrete examples. By induction, it is concluded that what is true in certain particular instances may be accepted as a general rule.

Another method of instruction is known as the "text book" or deductive method. This consists of the study of general principles illustrated by concrete instances. It thus proceeds from the general to the particular. By inference, the rule which should prevail in a given instance is deduced from the recognized established principle. The so-called "lecture method" is simply the text book method, where the oral lecture takes the place of the printed treatise.

Each of these methods has its advocates who urge the superiority of one over the others. As a practical matter, however, probably no one system is used exclusively in any law school. Different schools simply lay emphasis on one method or the other.

As Modern American Law is a well balanced combination of these methods the cases form an integral and essential part of the series.

EUGENE A. GILMORE,
Editor-in-Chief.

University of Wisconsin,
Madison.

PREFACE.

“Leading Illustrative Cases” are intended to accompany and to illustrate the principles of law set forth in “Modern American Law.” They comprise the best and most applicable decisions from both the American and English courts.

The cases are intended especially for the student who expects to make the law his profession. To him, their value cannot be exaggerated. From them the student is able to discover the principles which have been recognized and applied by courts in the past and which should govern the ever new and changing situations of the future. The study of an illustrative case immediately following the study of the principle involved makes the principle alive and concrete.

The student who really enters into the results of a line of leading cases learns more than a few verbal maxims which may be committed to memory. He sees the true meaning of legal doctrines when applied to facts, and becomes familiar with the tone of thought and the attitude of mind which prevail in our courts. In short he learns the notion of justice which governs the community and acquires the judicial sense so characteristic of the sound lawyer.

These are not merely cases; they are “leading”

cases and they are "illustrative." Both words are significant. There are millions of cases and no man's life is long enough to read them all. Some selection is necessary and the authors of "Modern American Law" have done the obvious and practical thing, viz., selected and edited the important, the "leading" cases on the various branches of the law. Not only are the cases "leading," but they are "illustrative"; that is, they illustrate, amplify and develop the fundamental principles of law expounded in "Modern American Law." They give you those principles in concrete application to actual litigation. In the opinion of the judge, you have a clear and comprehensive exposition of the law governing a real situation which has resulted in a lawsuit.

These cases are commended to you for your careful perusal.

TABLE OF CONTENTS

LEADING ILLUSTRATIVE CASES

PART I.

DESCENT AND DISTRIBUTION WILLS AND ADMINISTRATION GUARDIAN AND WARD

*(The Chapters are numbered to correspond with the Chapters in
Volume 5, Part I, in which the cases are cited.)*

DESCENT AND DISTRIBUTION.

CHAPTER I.

DESCENT.

TITLE OF CASE	PART I—PAGE
Fred Opel v. Anna Shoup et al.	1

WILLS AND ADMINISTRATION.

DIVISION I.

HISTORY AND NATURE IN GENERAL.

CHAPTER IV.

ORIGIN, HISTORY AND NATURE OF WILLS.

Cummings v. Lohr	8
------------------------	---

DIVISION II.

THE EXECUTION, REVOCATION, REVIVAL
AND REPUBLICATION OF WILLS.

CHAPTER VII.

THE EXECUTION OF WILLS.

TITLE OF CASE	PART I—PAGE
In Re Tyner's Estate.....	11
Karsten v. Karsten.....	16
Albright et al. v. North et al.....	21
Bryan's Appeal	28
Sears v. Dillingham.....	33
In Re Claflin's Will.....	37
Cunningham v. Cunningham et al.....	45
In Re Beggans' Will.....	51

CHAPTER VIII.

REVOCATION OF WILLS.

Simpson v. Foxon	54
Miles' Appeal	57
In Re Kissam's Will.....	63
Ladd's Will	66
In Re Knapen's Will.....	75
Durfee v. Risch.....	79

CHAPTER IX.

REPUBLICATION AND REVIVAL.

Stetson v. Stetson.....	82
-------------------------	----

PROBATE OF WILLS AND ADMINISTRATION OF ESTATES.

DIVISION I.

DECEDENTS' ESTATES.

CHAPTER XII.

IN GENERAL.

TITLE OF CASE	PART I—PAGE
Richards v. Pierce.....	92

CHAPTER XIII.

ADMINISTRATION.

Brown v. Baxter et al.....	96
Scott v. McNeal et al.....	99
In Re Zeph's Estate.....	113
Johnson v. Johnson.....	115
Bradshaw v. Lancashire & Y. Ry.....	117

DIVISION II.

GUARDIAN AND WARD.

CHAPTER XIV.

DEFINITIONS AND GENERAL PRINCIPLES.

In the matter of Ichabod Andrews, an Infant.....	122
Taff v. Hosmer.....	123
In the matter of the Guardianship of Laura Danneker, a Minor	127
State v. Clark	130

PART II.

INSURANCE

*(The Chapters are numbered to correspond with the Chapters in
Volume 5, Part II, in which the cases are cited.)*

FUNDAMENTAL PRINCIPLES.

CHAPTER II.

INSURABLE INTEREST.

TITLE OF CASE	PART II—PAGE
Sibley v. Prescott Ins. Co.....	1
Rohrbach v. Germania Fire Ins. Co.....	3
Cumberland Bone Co. v. Andes Insurance Co.....	4
Farmers' Mut. Ins. Co. v. New Holland Turnpike Road Co.	6
Reserve Mutual Ins. Co. v. Kane.....	10
Ulrich v. Reinoehl.....	11
Connecticut Mut. L. Ins. Co. v. Schaefer.....	19

CHAPTER III.

CONCEALMENT, REPRESENTATIONS AND WARRANTIES.

Phoenix Mut. Life Ins. Co. v. Raddin.....	21
---	----

CHAPTER IV.

SUBROGATION.

Michael v. Prussian Nat. Ins. Co.....	25
United States v. American Tobacco Co.....	26
Castellain v. Preston	29
Rayner v. Preston.....	31

CONTENTS

xiii

TITLE OF CASE	PART II—PAGE
Hall & Long v. The Railroad Companies.....	34
Phoenix Ins. Co. v. First Nat. Bank.....	35
Wager v. Providence Ins. Co.....	38
Southard v. Minneapolis, St. P. & S. M. Ry. Co.....	39
Connecticut Mutual Life Ins. Co. v. New York and New Haven Railroad Co.....	41

CHAPTER V.

WAIVER AND ESTOPPEL.

Orient Ins. Co. v. McKnight.....	43
Gray v. Germania Fire Ins. Co.....	45
Van Schoick v. Niagara Fire Ins. Co.....	47
Union Mut. Ins. Co. v. Wilkinson.....	48
Northern Assurance Co. v. Grand View Bldg. Association	50
Patterson v. Natural Premium Mut. Life Ins. Co.....	56

CHAPTER VI.

ASSIGNEES.

Continental Ins. Co. v. Munns.....	59
Warnock v. Davis	64
Steinback v. Diepenbrock	64

CHAPTER VII.

BENEFICIARIES.

Harrison v. Pepper	70
Lemon v. Phoenix Mutual Life Ins. Co.....	72
Jory v. Supreme Council, American Legion of Honor.....	73
Grand Lodge A. O. U. W. v. Frank.....	78

CHAPTER VIII.

CREDITORS.

Holmes v. Gilman.....	80
Amick v. Butler.....	90

PART III.

PERSONS AND DOMESTIC RELATIONS

*(The Chapters are numbered to correspond with the Chapters
in Volume 6, Part I, in which the cases are cited.)*

PARENT AND CHILD.

CHAPTER I.

PARENT'S RIGHTS AND DUTIES.

TITLE OF CASE	PART III—PAGE
Huke v. Huke	1
White v. Henry	6

CHAPTER II.

SPECIAL RELATIONSHIPS—TORTS.

Hoverson v. Noker	9
-------------------------	---

THE INFANT.

CHAPTER III.

THE LAW RELATING TO THE PERIOD OF INFANCY AND TO MAJORITY.

State v. Clark	11
----------------------	----

CHAPTER IV.

INFANT'S CONTRACTS AND CONVEYANCES.

Division I.—Where the Adult Takes the Initiative.

Boyden v. Boyden	13
McCrillis v. How	15

Division II.—Where the Infant Takes the Initiative.

TITLE OF CASE	PART III—PAGE
Stafford v. Roof.....	16
Edgerton v. Wolf	18
Wallace v. Leroy	19
Prout v. Wiley.....	23
Johnson v. Northwestern Mut. Life Ins. Co.....	28
Eureka Co. v. Edwards.....	36

Division III.—Miscellaneous.

Coursolle v. Weyerhauser	39
--------------------------------	----

HUSBAND AND WIFE.

CHAPTER VII.

INCEPTION AND NATURE OF MARRIAGE RELATION.

State, Appellant, v. Jackson.....	41
Pace v. Alabama.....	45
State v. Gibson.....	47

CHAPTER VIII.

EFFECT OF MARRIAGE ON THE PROPERTY RIGHTS OF THE PARTIES.

Feneff v. N. Y. Cent. & Hudson River R. R. Co.....	56
Kroessin v. Keller	60

CHAPTER IX.

DUTY OF HUSBAND TO SUPPORT WIFE.

Dolan v. Brooks.....	64
Hyman v. Harding.....	66

CHAPTER X.

CONTRACTS OF MARRIED WOMEN.

Yale v. Dederer.....	69
----------------------	----

CONTENTS

CHAPTER XI.

CONVEYANCES AND DEVICES OF MARRIED WOMEN.

TITLE OF CASE	PART III—PAGE
Lane v. Soulard.....	79

CHAPTER XIII.

TORTS AND ANTENUPTIAL LIABILITIES.

Kosminsky v. Goldberg.....	83
----------------------------	----

CHAPTER XVI.

DIVORCE AND ALIMONY.

Mosher v. Mosher	85
------------------------	----

PART IV.

QUASI-CONTRACTS

(The Chapters are numbered to correspond with the Chapters in Volume 6, Part II, in which the cases are cited.)

CHAPTER II.

RECOVERY FOR BENEFITS TORTIOUSLY OBTAINED BY DEFENDANTS—WAIVER OF TORT.

TITLE OF CASE	PART IV—PAGE
Minor v. Baldrige.....	1

CHAPTER IV.

RECOVERY OF MONEY PAID UNDER COMPULSION OF LAW.

Clark & Clark v. Pinney.....	5
Preston v. City of Boston.....	6

CHAPTER V.

RECOVERY FOR BENEFITS CONFERRED WITHOUT REQUEST.

Patterson v. Patterson.....	8
-----------------------------	---

CHAPTER VI.

RECOVERY FOR BENEFITS CONFERRED BY MISTAKE.

Bilbie v. Lumley.....	12
Wheadon v. Olds.....	13
Aiken v. Short.....	16

CHAPTER VII.

RECOVERY FOR BENEFITS CONFERRED UNDER CONTRACTUAL AGREEMENT.

TITLE OF CASE	PART IV—PAGE
White v. The Franklin Bank.....	19
Dix v. Marcy.....	25
Collier v. Coates.....	27
Butterfield v. Byron.....	32

PART V.

LANDLORD AND TENANT

(The Chapters are numbered to correspond with the Chapters in Volume 6, Part III, in which the cases are cited.)

CHAPTER I.

THE TENANCY.

TITLE OF CASE	PART V—PAGE
Talamo v. Spitzmiller.....	1

CHAPTER II.

THE RELATION OF LANDLORD AND TENANT.

Davis v. Williams.....	5
Story v. McCormick.....	9

CHAPTER III.

LEASES.

Baer v. Minock.....	15
Matthews v. Carlton.....	17

CHAPTER IV.

CONDITIONS, RESERVATIONS, AND EXCEPTIONS.

Frank v. Stratford-Handcock.....	19
----------------------------------	----

CHAPTER V.

COVENANTS.

Daly v. Wise.....	22
Ingalls v. Hobbs.....	26

CONTENTS

CHAPTER VI.

FIXTURES.

TITLE OF CASE	PART V—PAGE
Canning v. Owen	30
Mueller v. Chicago, M. & St. P. Ry. Co.....	37

CHAPTER VII.

THE LANDLORD'S RIGHTS, DUTIES AND LIABILITIES.

Borggard v. Gale.....	40
Darlington v. De Wald.....	42

CHAPTER VIII.

THE TENANT'S RIGHTS, DUTIES AND LIABILITIES.

Nicrosi v. Phillipi.....	46
Gay v. Davey.....	49

CHAPTER IX.

RENT.

Herter v. Mullen.....	54
-----------------------	----

CHAPTER X.

TERMINATION OF TENANCY.

Hunter v. Frost.....	66
----------------------	----

PART VI.

TAXATION

(The Chapters are numbered to correspond with the Chapters in Volume 6, Part IV, in which the cases are cited.)

CHAPTER I.

THE POWER OF TAXATION.

TITLE OF CASE	PART VI—PAGE
Pollock v. Farmers' Loan and Trust Co.....	1

CHAPTER II.

TAXATION BY THE UNITED STATES AND OF UNITED STATES PROPERTY.

McCulloch v. Maryland	8
-----------------------------	---

CHAPTER III.

THE TAXATION OF FOREIGN AND INTERSTATE COMMERCE.

Brown v. Maryland	13
-------------------------	----

CHAPTER V.

THE PUBLIC USES FOR WHICH TAXES CAN BE LEVIED.

Loan Association v. Topeka.....	23
---------------------------------	----

PART I

LEADING ILLUSTRATIVE CASES

DESCENT AND DISTRIBUTION WILLS AND ADMINISTRATION GUARDIAN AND WARD

DESCENT AND DISTRIBUTION

CHAPTER I.

DESCENT.

FRED OPEL v. ANNA SHOUP ET AL.

100 Iowa 407, 37 L. R. A. 583. 1897.

Appeal by defendants from a decree of the District Court for Johnson County in favor of plaintiff in a proceeding to enforce plaintiff's right to a share in the property which had been left by Elizabeth Hormel, deceased, at the time of her death intestate. Affirmed.

GIVEN, J., delivered the opinion of the court. * * *

* * * Elizabeth Hormel was a citizen of the United States, and a resident of the state of Iowa, at the time of her death. In the few months that transpired between the death of her husband and her own death, she had not elected whether she would take under his will or under the statutes, but it is not questioned but that she died seized of an undivided half of the real estate in controversy, and that her interest passed to her next of kin legally qualified to inherit the same, immediately upon her death. She died without issue, leaving as her only parent surviving her mother, Elizabeth Opel, a nonresident alien, residing in Bavaria, Germany. Elizabeth Opel died intestate, in Bavaria, on May 12, 1894, leaving as

her next of kin surviving her, her children, John Opel, Sr., and Barbara Degleman, both nonresident aliens, and the plaintiff, Fred Opel, a citizen of the United States, and resident of the state of Iowa. The plaintiff, Fred Opel, contends that he is entitled to inherit the undivided one-half of said real estate from his sister Elizabeth Hormel, either solely or with his said brother and sister. It is contended on behalf of the heirs of John C. Hormel that neither the plaintiff nor the other children of Elizabeth Opel are entitled to so inherit, and that, therefore, no heirs of Elizabeth Hormel being found legally entitled to inherit said property it goes to the heirs of her deceased husband, John C. Hormel, under § 2458 of the Code of Iowa.

Leaving out of consideration the fact of alienage, it would not be questioned but that upon her death the estate of Mrs. Hormel vested in her mother, and, upon her death in her children, Fred Opel, John Opel, Sr., and Barbara Delgeman. Chapter 85, Acts 22d Gen. Assem., approved April 9, 1888, provides as follows: "§ 1. Nonresident aliens * * * are hereby prohibited from acquiring title to or taking or holding any lands or real estate in this state by descent, devise, purchase, or otherwise only as hereinafter provided." An exception is thereafter provided in favor of "the widow and heirs of aliens who have heretofore acquired lands in this state under the laws thereof"; but this exception does not apply to this case, as Elizabeth Hormel was not an alien. § 2 of said chapter provides as follows: "§ 2. Any nonresident alien may acquire and hold real property to the extent of three hundred and twenty (320) acres, or city property to the amount of \$10,000 in value, providing that within five years from the date of purchase of said property the same is placed in the actual possession of a relative of such purchaser, the occupant being related to such owner within the third degree of kindred or the husband or wife of such relative, and naturalized citizen within ten years from the purchase of said property as aforesaid. In *Bennett v. Hibbert*, 88 Iowa, 155, it is held that "purchase" and "purchaser," as found in this section, include every method of acquiring title to real estate except by descent by operation of law. See *Burrow v. Burrow* (Iowa), 67 N. W. 287. § 7 of said chapter provides that the act shall not apply to aliens who are residents of the state of Iowa. It is certainly clear that

Mrs. Opel was disqualified from acquiring title to or taking or holding this real estate by descent under the prohibitions of the first section, and that she is not within either of the exceptions made to that prohibition. In *Furenes v. Mickelson*, 86 Iowa, 508, this court held that a naturalized citizen resident of this state cannot inherit through a father, who is a nonresident alien, the lands of a great uncle, who was a naturalized citizen, "on the ground that a line of inheritance cannot be traced through nonresident aliens," If nothing further appeared, the conclusion would follow from what we have said that the estate did not pass to Elizabeth Opel, and consequently did not pass to her children.

3. On January 21, 1845, there was concluded and adopted between the United States of America and the King of Bavaria, Germany, a treaty, articles 1, 2, and 3 of which are as follows:

"Article 1. Every kind of *droit d'aubaine*, *droit de retraite*, and *droit de détraction* or tax on emigration, is hereby, and shall remain, abolished between the two contracting parties, their states, citizens, and subjects, respectively.

"Art. 2. Where, on the death of any person holding real property within the territories of one party, such real property would, by the laws of the land, descend on a citizen or subject of the other, were he not disqualified by alienage, such citizen or subject shall be allowed a term of two years to sell the same, which term may be reasonably prolonged according to circumstances, and to withdraw the proceeds thereof, without molestation, and exempt from all duties of *détraction*.

"Art. 3. The citizens or subjects of each of the contracting parties shall have the power to dispose of their (real and) personal property within the states of the other, by testament, donation, or otherwise; and their heirs, legatees, and donees, being citizens or subjects of the other contracting party, shall succeed to their said (real and) personal property, and may take possession thereof, either by themselves or by others acting for them, and dispose of the same at their pleasure, paying such duties only as the inhabitants of the country where the said property lies shall be liable to pay in like cases."

The other articles provide for the care of the property in the absence of the heirs, the mode of deciding disputes, that the treaty shall not derogate from the force of laws of Bavaria

to prevent the emigration of the King's subjects, and that the treaty is made subject to the approval of the two governments.

This treaty abolishes, as between these governments and the subjects thereof, "every kind of *droit d'aubaine*, *droit de retraite*, and *droit de détraction* or tax on emigration." Black's Law Dictionary defines *droit* as equivalent to the English word "right"; and *droit d'aubaine* as, "in French law, a rule by which all the property of a deceased foreigner, whether movable or immovable, was confiscated to the use of the state, to the exclusion of his heirs, whether claiming *ab intestato* or under a will of the deceased." It is this provision of the treaty that we are called upon to consider. Appellants insist that the provisions of the treaty are not applicable in this case; that confiscation was never applied by any government to property of its own deceased citizens; and that the treaty only contemplates the protection of the citizens of either government, who may die having property in the other. The fault of this argument is in assuming that the protection is for the dead, and that the property remains in the deceased. It is conceded that this property vested in some living person immediately upon the death of Mrs. Hormel. If, under the common law, that person was disqualified by alienage from inheriting it, then this treaty applies, and removes that disqualification. In the absence of this treaty, Mrs. Opel was disqualified by alienage from inheriting this property; but by it the disqualification was removed, and therefore the property descended to her. Our inquiry, then, is as to property in Iowa belonging to a resident and subject of Bavaria.

Appellants cite *Frederickson v. Louisiana*, 64 U. S. 23 How. 445, 16 L. ed. 577. "Fink was a naturalized citizen of the United States at the time of his death, and residing in the city of New Orleans; also, that the legatees resided in the kingdom of Württemberg, and are subjects of the King of Württemberg." We had a treaty with that kingdom similar to that under consideration. Louisiana had a statute providing that "each and every person, not being domiciliated in this state, and not being a citizen of any other state or territory in the Union, who shall be entitled, whether as heirs, legatee, or donee, to the whole or any part of the succession of a person deceased, whether such person shall have died in this state or elsewhere, shall pay a

tax of 10 per cent on all sums, or on the value of all property which he may have actually received from said succession, or so much thereof as is situated in this state, after deducting all debts due by the succession." Rev. Stat. 1876, § 3683. The claim of the state to this tax was resisted, on the ground that it was contrary to the third article of the treaty, and that article alone, and not the second, as in this case, was under consideration. The third article of that treaty relates solely to personal property, and is different in its language from the second, which is identical with the second in this. The court held that the act does not make any discrimination between citizens of the state and aliens in the same circumstances, and sustained the tax as valid. Appellants quote from the opinion as follows: "But we concur with the supreme court of Louisiana in the opinion that the treaty does not regulate the testamentary dispositions of citizens or subjects of the contracting powers in reference to property within the country of their origin or citizenship. The cause of the treaty was that the citizens and subjects of each of the contracting powers were or might be subject to onerous taxes upon property possessed by them within the states of the other by reason of their alienage, and its purpose was to enable such persons to dispose of their property, paying such duties only as the inhabitants of the country where the property lies pay under like conditions. The case of a citizen or subject of the respective countries residing at home, and disposing of property there in favor of a citizen or subject of the other, was not in the contemplation of the contracting powers, and is not embraced in this article of the treaty." This view of that treaty is applicable to the one before us, but we fail to see wherein it supports the claim that the facts of this case do not bring it within the provisions of this treaty.

4. Appellants cite authorities to the effect that the states alone have the right to regulate, by legislation, descents and conveyances of real estate within their borders; and from this it is argued that the Federal government has no power, "by treaty, to interfere with the right of the state in regard to the descent of property upon the death of its citizens"; that treaties made without authority are not valid; that this treaty is in conflict with the laws of Iowa, and is therefore of no force or

effect. It may be conceded that the states alone have such power; that they alone may declare to what kindred the estate of persons dying intestate shall descend. It must also be conceded that the Federal government alone has power to treat with other governments as to rights of the citizens of each within the territory of the other. This treaty does not attempt to regulate descents of real property in Iowa. It does not declare that, when a son or daughter dies without issue, the estate shall go to the parents. It is left to the state, and Iowa has so provided. This treaty simply declares that, if that parent is disqualified by alienage, as to the citizens of these two governments this disqualification is removed. In article 6 of the Constitution of the United States it is provided that "this Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made or which shall be made under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or the laws of any state to the contrary notwithstanding." Many cases may be found wherein the courts have enforced treaty stipulations, similar to this, in favor of foreign claimants; but the case of *People, Atty. Gen., v. Gerke*, 5 Cal. 381, is the first we find wherein the power of the Federal government in this respect was questioned. In that case, Deck, a citizen of Prussia, died in San Francisco, leaving undisposed of a large amount of real property in that state. Article 14 of our treaty with Prussia is the same as article 3 of this treaty. The attorney general, on behalf of the state, denied the power of the Federal government to make such a provision by treaty, and argued, as is done in this case, that to exercise such power would permit the Federal government to control the internal policy of the states, and in cases like this to alter materially the statutes of descent. The court, after an able consideration of the subject, concludes as follows: "I can see no danger which can result from yielding to the Federal government the full extent of powers which it may claim from the plain language, intent, and meaning of the grant under consideration. Upon some subjects the policy of a state government, as shown by her legislation, is dependent upon the policy of foreign governments, and would be readily changed upon the principle of mutual concession. This can

only be effected by the action of that branch of the state sovereignty known as the general government, and when effected, the state policy must give way to that adopted by the governmental agent of her foreign relations." The reasoning and conclusion of the opinion are strongly emphasized by what is added by Justice Ryan. While the question of the power of the Federal government in this respect was not directly passed upon in the following cases, they show that the courts have uniformly enforced such treaties, without doubting the power of the Federal government to make them. * * *

* * * In the recent case of *Wunderle v. Wunderle*, 144 Ill. 40, 19 L. R. A. 84, the subject of descents and alienage is considered at length, and with marked care and ability, as affected by the common law, and by statutes of the states and by treaties with the United States. In considering the effect of conflicts between the statute of the state and a treaty with the United States, the court, after citing article 6 of the Federal Constitution, says: "In construing this article, it has been held that provisions in regard to the transfer, devise, or inheritance of property are fitting subjects of negotiation and regulation by the treaty-making power of the United States, and that a treaty will control or suspend the statutes of the individual states whenever it differs from them. Hence, if the citizen or subject of a foreign government is disqualified under the laws of a state from taking, holding, or transferring real property, such disqualification will be removed, if a treaty between the United States and such foreign government confers the right to take, hold or transfer real property." If it may be said that chapter 85 of the Acts of the 22d General Assembly is in conflict with said treaty of January 21, 1845, reason and the authorities support the conclusion that the treaty must control.

It follows from the conclusions we have reached that an undivided one-half of the property in question vested in Mrs. Opel upon the death of her daughter, and upon her death it passed to her children, subject to the conditions imposed by said treaty, and that the other undivided one-half passed to the heirs of John C. Hormel, deceased.

The decree of the district court being in harmony with these conclusions, it is affirmed.

WILLS AND ADMINISTRATION

DIVISION I

HISTORY AND NATURE IN GENERAL

CHAPTER IV.

ORIGIN, HISTORY AND NATURE OF WILLS.

CUMMINGS v. LOHR.

246 Ill. 577. 1910.

DUNN, J., delivered the opinion of the court.

Christian Lohr died on July 18, 1887. His wife, Louisa Lohr, and his children, Amelia Cummings, Henry Lohr and August Lohr, survived him. His will, dated July 21, 1871, was admitted to probate. By it, after providing for the payment of his debts, he disposed of his property as follows: "I give and bequeath to Louisa Lohr, my beloved wife, all the real estate that I may die seized of, being the land that I now live on in said township of Locust, Christian County, Illinois, also all my personal property that I may die seized of, provided she remains my widow, but should she marry, then all the property shall go to my children that are alive, except one-third of the land, which she is to have during her lifetime." At the date of the will Christian Lohr owned the farm mentioned in the will, consisting of 160 acres, and no other real estate. He afterwards acquired, and owned at his death, 17 acres of other land and some town lots in the village of Owaneco. Louisa Lohr, after her husband's death, conveyed one-half of the 160-acre farm to August Lohr and the other half to Henry Lohr, who afterwards conveyed his half to his brother August. The plaintiff in error,

Amelia Cummings, filed a bill against Louisa Lohr, August Lohr and Henry Lohr for the partition of all the real estate, claiming that the will devised only a life estate to Mrs. Lohr in the 160 acres; that the remainder, subject to such life estate, descended to the children, and that the 17 acres and the town lots, acquired after the date of the will, were intestate property, which descended to the heirs subject to the widow's right of dower, if any. The defendants in error answered the bill, claiming that the will devised all the premises to Louisa Lohr in fee simple. They also set up an agreement between the three children and their mother, pursuant to which they aver that an 80-acre tract adjoining the 160-acre farm was purchased for the plaintiff in error and it was agreed that the brothers should have the farm. A cross-bill was also filed, setting up the same agreement and praying that the respective parties be decreed to execute conveyances according to the rights of the parties. The court found that August Lohr was the owner in fee simple of the 160-acre tract, and that the plaintiff in error, August Lohr and Henry Lohr were tenants in common, in fee simple of the 17 acres and the town lots, and decreed that the plaintiff in error convey to August Lohr all the interest she once had in the 160 acres and that partition be made of the residue of the property, subject to the dower of Louisa Lohr. The plaintiff in error insists that the court erred in refusing partition of the 160 acres and in decreeing partition of the other lands subject to dower. By cross-errors the defendants insist that the court erred in decreeing partition of any of the premises.

Section 13 of chapter 30 of the Revised Statutes provides that "every estate in lands which shall be granted, conveyed or devised, although other words heretofore necessary to transfer an estate of inheritance be not added, shall be deemed a fee simple estate of inheritance, if a less estate be not limited by express words, or do not appear to have been granted, conveyed or devised by construction or operation of law." The estate devised to Louisa Lohr was therefore an estate in fee simple except as limited by the words, "provided she remains my widow, but should she marry, then all the property shall go to my children that are alive, except one-third of the land, which she is to have during her lifetime." Counsel for plaintiff in error has assumed that the word "provided" has the

same meaning in the will as the word "while." In our judgment this is erroneous. "While" is merely an adverb expressing duration. "Provided" is an apt word to express a condition. While this is not its fixed and invariable meaning, it will be so taken unless a different intent appears from the context and an examination of the whole instrument. *Rich v. Atwater*, 16 Conn. 419; *Stanley v. Colt*, 5 Wall. 166. The words of the devise are sufficient to pass the fee to the widow, and the proviso merely annexes a condition which converts the fee simple into a conditional or base fee, subject to be terminated by her marriage. Her conveyances of the 160 acres to August and Henry Lohr, and Henry's conveyance to August, therefore vested the fee in the latter, subject, of course, to the conditional limitation over in the event of her marriage.

The question whether a will passes real estate acquired after its execution depends upon the intention of the testator. Unless an intention to dispose of such estate affirmatively appears from the will it will not pass. *Woman's Union Missionary Society v. Mead*, 131 Ill. 338. Here the testator devised to his wife "all the real estate that I may die seized of." This language shows an intention to devise any property he might acquire after the execution of the will, and we do not regard the words descriptive of the land he then owned as intended to limit the prior devise of all his real estate. The will gave to the widow a qualified fee in all the land of which the testator died seized, subject to be terminated by her marriage. The plaintiff in error has no present estate in any of the land but only an expectancy. No estate will vest in her except in the event of the marriage of Louisa Lohr. *Fifer v. Allen*, 228 Ill. 507. There can be no partition of an expectancy, and the bill should therefore have been dismissed. * * *

Reversed and remanded, with directions.

DIVISION II

THE EXECUTION, REVOCATION, REVIVAL AND REPUBLICATION OF WILLS

CHAPTER VII.

THE EXECUTION OF WILLS.

Section A. Fraud, Undue Influence, and Mistake.

In Re TYNER'S ESTATE.

97 Minn. 181, 106 N. W. 808. 1906.

ELLIOTT, J. This is an appeal from a judgment of the district court, sustaining the will of John Tyner after the probate court had refused to admit it to probate.

John Tyner died testate, November 10, 1903, at the age of 87, leaving as heirs at law three sons, Richard, Thomas, and John, one daughter, Rebecca O'Leary, the children of two deceased daughters, and his wife Margaret. The will in question was executed July 2, 1891. The property consists of 160 acres of land in Dakota county, Minn., and personal property of about the value of \$4,500. Under the will Richard, Thomas, and John receive \$2.50 each. To the wife, Margaret, is given "all the rest, residue and remainder of my property, both real or personal, or mixed, of which I may die seized or possessed, to have and to hold for and during the term of her natural life, and to use as she may deem best, and I do hereby authorize my said wife to dispose of any of the personal effects and convert the same into money and to use so much of the money as may be necessary for her personal support."

After the death of the wife, Rebecca O'Leary, the daughter, and Mary A. Bird, a niece, are given \$500 each "out of my moneys and credits, if so much remains after the payment of

all claims and expenses of the last sickness of myself and wife." Other small bequests were made, but they are not important as far as this appeal is concerned. After the death of Margaret Tyner, all the land owned by John Tyner is given to Richard and William Varian, the nephews of the wife, Margaret. The result is that Margaret Tyner is given the use of the land and of all the personal property during her life, and at her death the land goes to her nephews, to the entire exclusion of the children of the testator. The contestants, the children of the testator, contend that the will is the result of undue influence exercised by Margaret Tyner, the wife of the testator.

1. The right to dispose of property by will is the creature of positive law, but it is carefully guarded and protected. A person who has testamentary capacity may make such a disposition of his property as conforms to his ideas of justice and propriety. He may be guided by lofty and beneficent motives, or by sordid prejudice and personal dislike. The justice and righteousness of his final dealings with those who are the natural objects of his bounty and toward whom he has assumed solemn duties and obligations are to be determined by the final judge of all human conduct. Subject to very limited statutory restrictions, the power of testamentary disposition is absolute.

But a valid will must be the result of the voluntary act of the testator, and not merely express the will of some other person. The wife, and other possible objects of his bounty, may properly influence his actions; but this influence must not be so great as to destroy his power of will. The words "undue influence" carry with them their own limitation. The influence must not be undue. To constitute undue influence the testator must be so influenced by persuasion, pressure, or fraudulent contrivance that he does not act intelligently or voluntarily and is subject to the will and purpose of another. It may be exerted through threats, fraud, importunity, or the silent, irresistible power which the strong often exercise over the weak or infirm. It must be sufficient to destroy this free agency and substitute the will of another for that of the testator. Entreaty, importunity, or persuasion may be employed, as may appeal to the memory of past kindnesses and the calls of the distressed. Mere suggestions or advice addressed to the understanding or judgment of the testator never constitute undue influence;

neither does solicitation, unless the testator is so worn out with importunities that his will gives way. *Robinson v. Robinson*, 203 Pa. 401, 53 Atl. 253.

The fact that the will is inofficious, harsh, and unjust is not in itself evidence that it was induced by undue influence. *Mitchell v. Mitchell*, 43 Minn. 73, 44 N. W. 885. Nor is the fact that the beneficiary under the instrument had special opportunities to exert undue influence over the testator. But when there is evidence, independent of any question of inequality in the will, tending to show acts of undue influence over the testator to procure the will on the part of those who appear to have been preferred, the fact that the distribution of property is grossly inequal and unjust may be received to strengthen the evidence of undue influence. * * *

Generally the burden of showing that a will was procured by undue influence rests upon those who assert the fact; but when the contestants have made a *prima facie* case, by the production of evidence from which the presumption of undue influence arises, the burden is then upon the proponents to show that the instrument is the will of the testator. It is not very material whether we say that in such case the burden shifts, or that the evidence produced, aided by the presumption which arises therefrom, is evidence sufficient to make a *prima facie* case. * * * What is meant is that a point is reached when the contestant prevails unless the proponent assumes the obligations of going forward with his evidence. * * *

In the light of these general principles we proceed to a review of the evidence. It is not possible to set out all the testimony; but a very brief summary will be sufficient to show that the contestants fulfilled all the requirements necessary to make a *prima facie* case of undue influence, and that it was not overthrown by the evidence offered by the respondent. *John Tyner's* first wife died in 1866, and within two months thereafter he married *Margaret Varian*. When the second wife came into the family, she found four children, all under 18 years of age. Almost from the beginning the family life was unhappy. She evidently took a dislike to the children, and soon began a systematic effort to drive them from the home. In this she was ultimately successful. The children were frequently whipped by the father at her request. They were not allowed the food

which was supplied to the other members of the family. They were deprived of proper and necessary clothing and schooling and seem to have been generally illtreated. One of the boys returned home on two occasions and was refused admission by his step-mother. Another farmed the land for two years, but finally left because of trouble with Margaret. A few years later the father sent for him and he made another attempt to run the farm, with the same result. She disliked them, and was determined that they should not be at home with their father. It clearly appears that the boys were driven from home by the continuous ill treatment of Margaret Tyner. During the last illness of John Tyner his wife would not permit reports of his condition to be sent to his absent children, and she prevented the news of his death reaching them until it was too late for them to attend the funeral. There is no evidence that the children were to blame, and in view of the age and relation of the parties it should not be presumed. John Tyner was an illiterate man, unable to read or write. He seems to have had some natural capacity for acquiring and retaining money, which he concealed about the premises in old tomato cans. The testimony shows that Margaret was much the stronger character, and generally had her way about household and business affairs. She had some education, and her husband, as is usual in such cases, overestimated the importance of a little book learning. He was so deaf that it was necessary for her to be with him when he transacted any business and do most of the talking. He seems to have relied largely upon her for his information and trusted to her judgment. She was persistent, energetic, and resourceful. Like her husband, she was in the habit of drinking, and they frequently went to town and got drunk together.

The property and its final disposition seems to have been continually in her mind, and from the first she determined that the children should never have the land. She told the neighbors that the land had been promised to her brother's children. She kept everlastingly talking to her husband about the worthlessness of the boys, and accused them of being lazy, thieving, and shiftless. Her purpose, it may fairly be assumed, was to so prejudice his mind against them that he would cast them off and leave his property to others of her choosing. She told the neighbors that the children should not have the land. When

the will was made Margaret was with the testator, making suggestions and doing part of the talking. After it was made she expressed her approval of its contents, and from that time until the death of John Tyner she exerted her influence to prevent him from becoming reconciled to the children and changing the will. She said "the will was made the way she wanted it, and was not going to be changed." It is apparent that she earnestly desired to influence her husband in the making of his will, and that she was induced to do this by her dislike of the children and her desire to have the land go to her own relatives. She was also to some extent personally benefited by the will, as she received all the law would give her, and in addition thereto she was given complete control over all the personal property during her life.

But the ultimate question is whether her influence actually induced the will. It is certain that it was exerted for the purpose of controlling the making of the will and the disposition of the property. John Tyner stated to disinterested parties that Margaret would not permit him to leave the land to the children. He told the witness Flannery that he gave the boys nothing because Margaret did not want them to have anything. He also told Mrs. Joego that he was not going to give any of the land to his children, because Margaret "would not allow him to." The same statement was made to Mary Tyner. All of this evidence stands uncontradicted. Margaret was present at the trial, but was not called as a witness. John Tyner's wife and children were the natural beneficiaries of the property, and there is nothing to show that the children were not deserving of his consideration. The attempt to show that they had improperly left home and neglected their father failed completely. There being evidence of this character in the case, the inofficious, harsh, and inequitable character of the will may also be taken into consideration. The Varians, who received the homestead, are not of the blood of the testator, but are the nephews of his wife. As far as the record shows they had never done anything for John Tyner, except farm the land for a time, nor was he under any obligation to them. The evidence thus presents a much stronger case than appeared in *Clarity v. Davis*, 92 Minn. 60, 99 N. W. 363, where Chief Justice Start, speaking for the court, said: "In view of these admitted facts and

the relation existing between the legatee and the testator, the claim of the appellant that the burden was upon the respondent to show by clear and satisfactory evidence that the testator was mentally competent to make his will and that its execution was not procured by undue influence and fraud is, as it must be, conceded by the respondent."

Judgment reversed, and new trial ordered.

Ambiguitas Latens.

KARSTEN v. KARSTEN.

254 Ill. 480. 1912.

CARTWRIGHT, J., delivered the opinion of the court:

John Karsten died on July 9, 1910, leaving Sofie Karsten, his widow, Mary Spellmeyer, Charles F. Karsten and Annie Knox, his children, and Freda Karsten, Reuben Karsten and Luella Karsten, his grandchildren, minor children of William Karsten, a deceased son. He owned four hundred acres of land in Ford county, a lot and a half in the village of Melvin and some personal property. He left a last will and testament, the material parts of which are as follows:

"First. That I hereby Will unto my Beloved Wife all my Real and Personal Property Sofie Karsten as long as she may live after her Death and the West Half (W. $\frac{1}{2}$) of the North East Quarter ($\frac{1}{4}$) of Section twenty-three (23) Township twenty-five (25) Range Eight (8) East (3) P. M. and the North Half ($\frac{1}{2}$) of the North West Quarter ($\frac{1}{4}$) of Section twenty-four (24) Township twenty-five (25) Rainge (8) East of the Third P. M. Shall be sold to Pay all Expenses and to pay to the Hears of My Deceased Son the Sum of one Thousand Dollars Each that is to say Fridie Karsten and Ruben Karsten and Luella Karsten that if they all three Die that the Grant shall fall Back to the Original Heirs.

"Second that it is my Will that My Daughter Mary Spellmeyer and My Son Charles F. Karsten and My Daughter Annie Knox shall be Equally Devided between all three.

"Third: that the One of My Children shall take care of one or either of us shall receive for their recompenc the sum of One Thousand Dollars, (\$1000.00)

“Fourth: that it is My Will that My Executor plase a Monument in one year after our demice not to Exceed the sum of Three Hundred Dollars, \$300.00.

“Fifth: that any of My Heirs oing the Estate any notes shall be counted in their share.”

The widow, Sofie Karsten, died on March 2, 1911, and on May 29, 1911, Charles F. Karsten, as executor of the will, filed in the circuit court of Ford county the original bill in this case against the devisees, legatees and heirs-at-law, including himself, asking the court to construe the will. The court permitted an amendment making the appellants, Charles F. Karsten in his own right and Mary Spellmeyer and Annie Knox, complainants, and the appellees, Charles F. Karsten as executor and the three minor grandchildren and others, defendants. The amended bill alleged that the provision of the second item of the will expressed in the following words, “that is my Will that My Daughter Mary Spellmeyer and My Son Charles F. Karsten and My Daughter annie Knox shall be Equally Devided between all three,” was operative as a devise and bequest to the three persons named therein of the residue of the estate, real and personal, after the payment of debts, costs of administration, the cost of the monument and the specific bequests mentioned in the will; that the testator did not own the north half of the north-west quarter of section 24 but did own the south half of said north-west quarter, and owned no other land in said section; that through the inexperience of the scrivener and the want of correct knowledge of the description of the land the word “north” was inserted instead of the word “south”; that the testator intended to dispose of land he owned in section 24, and that the will should be construed by striking out the word “north” and making the same read, “the south half of the north-west quarter.” Charles F. Karsten in his capacity as executor was defaulted and a guardian ad litem was appointed for the minor defendants. The guardian demurred specially to the bill, and the court sustained the demurrer as to all of the grounds but one. The complainants elected to stand by their amended bill, and the court entered a decree construing the will and finding that the testator died intestate as to all of his property except the west half of the north-east quarter of section 23, which he owned and which he ordered to

be sold, and that the intestacy included any balance of the fund arising from the sale of that tract of land after paying the expenses of administration arising from any deficiency in the personal property, the bequests to the minor children, \$1,000 to the child or children who took care of the testator or his wife, and the cost of the monument. From that decree this appeal was taken.

The important question to be determined is whether the testator by the second item of his will devised and bequeathed the residuary estate, real and personal, to the son and two daughters therein named. Inasmuch as the statute requires wills to be in writing and attested by witnesses, the settled rule is that while surrounding facts and circumstances may be proved to explain a latent ambiguity which is not found upon the face of the instrument itself, extrinsic evidence cannot be admitted to explain a latent ambiguity which appears on the face of the will or to supply its omissions and deficiencies, since that would be to make a will for the testator. Under the statute, that, only, is the will of the testator which is in writing and signed by him, and the statutory provisions would be rendered nugatory and the door opened to all the evils which the law requiring wills to be in writing and attested was designed to prevent, "if, when the written statement failed to make a full and explicit disclosure of his scheme of disposition, its deficiencies might be supplied or its inaccuracies corrected from extrinsic source." I Jarman on Wills, 4th ed. 409. Extrinsic evidence is a mere aid to construction and is never admissible for the purpose of making a will for the testator, even if it establishes the fact that he intended to make one, if he did not, in fact, do so.

The facts alleged in the bill not appearing on the face of the will are, that the testator owned four hundred acres of land in Ford county and a lot and a half in the village of Melvin; that he was born in Germany, was sixty-seven years old and not versed in such matters as executing wills. Great allowance is to be made for ignorance or want of skill of one who writes a will, and no want of technical formality will prevent the courts from executing the intention of the testator if it can be ascertained from the language employed, however informal it may be; but we are unable to determine the intention of the testator

from his birthplace, age or experience in the making of wills. The fact of ownership of a large amount of land not disposed of by the will is material as an aid to construction, because there is a legal presumption against partial intestacy. There is a strong presumption that a testator did not intend to die intestate as to any of his property, and a gift will be sustained without express or formal words if the intention to make it clearly appears from the will as a whole. But such a gift cannot rest upon conjecture. *Connor v. Gardner*, 230 Ill. 258. The intention is not one which it may be inferred existed in the mind of the testator but it is the intention expressed in the language of the will, and the rule is inflexible that surrounding circumstances cannot be resorted to for the purpose of importing into a will any intention which is not there expressed. *Lomax v. Lomax*, 218 Ill. 629. The mere fact that a testator owned property would not justify a court in holding that he disposed of it by will unless an intention to dispose of it is found in the will itself, because that would prevent partial intestacy in practically every case. It is undoubtedly true that after the disposition of a portion of an estate by devises and bequests a provision might be interpreted as a residuary disposition of what remained without the use of the word "residue" or "remainder," or other formal expression, but the will must indicate some subject of the devise or bequest. In this case the testator by the first item had merely directed the sale of one tract of land that he owned and another that he did not own, for the purpose of paying the sum of \$1,000 to each of his three grandchildren, with a provision that if they should all die the grant should fall back to the original heirs, which meant the death of all in the lifetime of the testator. *Fifer v. Allen*, 228 Ill. 507. The grandchildren were living at the death of the testator, so that the provision for the sale of their benefit became effective. The testator, of course, intended by the second item to give something to the three children therein named, but whatever it was, he failed to indicate the subject matter in any way. The second item is devoid of sense or meaning, and it would require the insertion of matter not expressed by the testator to make it a residuary clause devising the balance of the property not previously disposed of, to the three children therein named. The second item is followed by the third,

which provides that the one of the children who should take care of the testator or his wife should receive the sum of \$1,000, and the fourth that the executor should erect a monument not exceeding in cost \$300. The fifth item provides that if any of the heirs owe the estate any notes the same shall be counted in their share, but that provision would apply just as aptly to a devise of specific property or any portion less than the whole of the residuary estate. The subject of the devise in the second item was not merely uncertain or indefinite but was entirely omitted, and there was nothing mentioned, the court had no power to add to it by inserting in it something that did not appear. *Engelthaler v. Engelthaler*, 196 Ill. 230.

The testator directed the sale of the tract of land which he owned and the north half of the north-west quarter of section 24, which he did not own, and the proceeds were to be devoted to paying expenses and the sum of \$1,000 to each of the three grandchildren. The bill alleged that the word "north" should be stricken out as a false matter of description and the will be held to direct the sale of the south half of the quarter section. The argument against the conclusion of the court is mainly based upon the presumption against partial intestacy, but that presumption is overcome by the fact that the testator did not dispose of all his estate but died intestate as to a part of it. There is no occasion, however, to enter upon the consideration of the many questions raised by counsel respecting the striking out of words of false description, for the reason that the question has become one of no practical importance. It does not appear that the sale of the tract which the testator did own would be insufficient for the payment of the expenses and legacies to be paid out of the proceeds of the sale, and there was no fact alleged showing that it would be conducive to the interests of the complainants that the south half of the quarter section should be sold and the proceeds distributed, rather than it should pass to them and the other heirs-at-law as land. It was not alleged that any one of the children took care of the testator and his wife or became entitled to \$1,000, if that sum was to be paid out of the proceeds of the sale of the specific property ordered to be sold, and any surplus would go in exactly the same proportions to the same heirs as if the land itself passed as intestate property. The guardian ad litem,

acting, so far as we can discover, in the interest of the minors who were to receive the legacies, demurred to the bill with respect to the construction sought to be put upon it by the complainants, evidently deeming it for the best interest of the minors that the land should not be sold. As we have held that the complainants were not entitled, under the second item, to any surplus that might remain from a sale and will take their interests as heirs in any intestate estate, we do not see any benefit that would result to them by striking out any part of the description and selling land to divide the proceeds. No question is raised in this court concerning the propriety of Charles F. Karsten being on both sides of the case.

The decree is affirmed.

Section B. Form of the Will.

Where the Signature Should Appear.

ALBRIGHT ET AL. v. NORTH ET AL.

146 Cal. 455, 80 Pac. 700, 106 Am. St. Rep. 5. 1905.

Per Curiam. A document purporting to be the last will and testament of Henry Seaman, deceased, was presented to the superior court, and an application for its probate was denied upon the ground that it had not been properly executed, in that the name of the testator was not subscribed at the end thereof. From the judgment thus entered, the present appeal has been taken.

The instrument was written upon a printed form or blank consisting of four pages folded in the middle, like ordinary legal cap. Upon the upper portion of the first page was a printed heading and introduction, occupying about one-fourth of the page. In the printed form the remainder of that page and the entire second page were left blank. The dispositive parts of the will were written upon the blank portion of the first page and about one-fourth of the blank portion of the second page, and at the close thereof a line was drawn in red ink transversely to the bottom of the second page. At the top of the third page there was printed a form for the appointment of an executor, and a clause revoking all former wills, and immediately after this a testimonium clause, underneath which, and

extending to a little below the middle of the page, was printed an attestation clause. The blanks left for the name of an executor and for the attestation of the will were left unfilled. The remainder of the third page and the first or upper half of the fourth page are blank. The printed form was prepared to be twice folded from the bottom to the top, and across the face of the paper as thus folded, and at the top thereof, were the printed words: "The Last Will and Testament of," under which the scrivener had written, "Henry Seaman." Blank forms for a date and for filing the instrument with the clerk were printed underneath this, the whole occupying the upper half of this outside face of the paper when folded. Underneath this printed matter was written, "Henry Seaman," and underneath his name the word "witness," and underneath that the names, "M. O. Wyatt, J. H. Wright." The remainder of the fourth page was blank.

It was shown at the hearing that the decedent had written his name at that place in intended execution of his will, and that at his request Messrs. Wyatt and Wright had signed their names as witnesses thereto. It was also shown that, with the exception of these signatures, the instrument is in the same condition as it was when the decedent signed his name thereto.

The right to make a testamentary disposition of one's property is purely of statutory creation, and is available only upon a compliance with the requirements of the statute. The formalities which the Legislature has prescribed for the execution of a will are essential to its validity, and cannot be disregarded. The mode so prescribed is the measure for the exercise of the right, and the heir can be deprived of his inheritance only by a compliance with this mode. For the purpose of determining whether a will has been properly executed, the intention of the testator in executing it is entitled to no consideration. For that purpose only the intention of the Legislature, as expressed in the language of the statute, can be considered by the court, and whether the will, as presented, shows a compliance with the statute. *Estate of Walker*, 110 Cal. 387, 42 Pac. 815, 30 L. R. A. 460, 52 Am. St. Rep. 104.

Section 1276, Civ. Code, requires every will, other than nuncupative or holographic, to be "subscribed at the end thereof" by the testator, in the presence of two attesting witnesses, each

of whom must, in his presence and at his request, sign his name as a witness "at the end of the will." This section is from the Revised Statutes of New York, adopted by that state in 1830. These provisions are incorporated into the Civil Code prepared for adoption by that state by David Dudley Field, and, in their report of a Civil Code to the Legislature of 1871, the code commissioners of this state refer to this Code as the source of the section. In considering the section the decisions of that state upon the same question are therefore entitled to great consideration. A similar statute was enacted in England in 1837 (St. 1 Vict. c. 26), but the decisions under that statute as to what constitutes the "end" of a will are inconsistent and contradictory. In the earlier cases the statute received a very liberal construction in reference to the amount or extent of blank space that might be left between the termination of the will and the signature of the testator, but afterwards the same judge who gave this construction, as did also the Privy Council in affirming his judgment, stated that he felt it necessary to construe the act more strictly, on the ground that the provision was intended to prevent any addition being made to the will after the deceased had executed it * * * and the statute was construed as requiring the name to be written immediately after the termination of the testamentary provisions, without any space whatever between them. It was in view of these different constructions of the statute that in 1852 Parliament passed an explanatory act (St. 15 Vict. c. 24) known as "Lord St. Leonard's Act," which provided that the will should be valid "if the signature be so placed at or after or following or under or beside or opposite to the end of the will, that it should be apparent on the face of the will that the testator intended to give effect by such his signature to the writing signed as his will," and that no such will should be affected by the circumstance that "a blank space shall intervene between the concluding end of the will and the signature," etc.; thus permitting an inquiry into the intention of the testator, contrary to the rule on that subject in this state. The provisions of this act are so directly opposed to section 1276, Civ. Code, that the decisions thereunder are not entitled to any consideration in interpreting the section. * * *

The provision that the will must be subscribed at the end

thereof requires the testator's name to be written at the termination of the testamentary provisions which he makes in the instrument. The "will" at whose end the name is to be subscribed is not the sheet of paper or other material upon which these testamentary provisions are written, but it is the declaration which the testator has written thereon for such testamentary disposition, and the "end thereof" is not the foot or physical end of the sheet of paper upon which the "will" is written, but is the physical termination of the testamentary provisions which constitute the will. "The act of authentication must take place at the termination of the testamentary disposition." *McGuire v. Kerr*, 2 Bradf. Sur. (N. Y.) 244. "To say that, where the name is, there is the end of the will, is not to observe the statute. That requires that, where the end of the will is, there shall be the name. It is to make a new law to say that, when we find the name, there is the end of the will. The instrument offered is to be scanned to learn where is the end of it, as a completed whole, and at the end thus found must the name of the testator be subscribed." * * *

The requirement that the name shall be subscribed "at" the end of the will is not satisfied by having that name written at any place "after" the termination of the written matter, irrespective of the relation which such place bears to the concluding portion of the will. This provision does not, however, of necessity, require that it shall be in immediate juxtaposition with the concluding words of the instrument, but that it shall be so near thereto as to afford a reasonable inference that the testator thereby intended to indicate an authentication of the instrument as a completed expression of his testamentary purposes. It must appear upon the face of the instrument not only that he intended to place it at the end of his testamentary provisions, but that he has in fact placed it in such proximity thereto as to constitute a substantial compliance with this requirement of the statute. While a slight space, such as a single line, or even more, might be left blank between the written matter and the name, without impairing the validity of the will, yet to leave blank an entire page between the two would indicate a disregard of the requirements of the statute, whether resulting from ignorance or intention, which would prevent its admission to probate. See *Soward v. Soward*, 1 Duv. (Ky.) 126.

Appellants have cited the case of *Gilman's Will*, 38 Barb. (N. Y.) 364, in which the written matter of the will terminated four lines above the bottom of the page where the testator signed his name, and in which the court said: "An instrument is signed at the end when nothing intervenes between the instrument and the subscription. The place named in the statute is the end. The end of an instrument in writing commences and continues until something else or some other writing occurs." This language may have been appropriate to the will then before the court, but, as a construction to be given to the statute, it does not meet with our approval, and is, moreover, inconsistent with the construction given in the above cases cited from the Court of Appeals of that state. Particularly do we dissent from the definition of "end" as given in the last sentence of the quotation.

The formalities which the Legislature has prescribed for the execution of wills are to provide against false and fraudulent wills, and to afford means of determining their authenticity. A very evident purpose of requiring the testator's name to be subscribed at the end of the will is not only that it may thereby appear upon the face of the instrument that the testamentary purpose which is expressed therein is a completed act, but also to prevent any opportunity for fraudulent or other interpolations between the written matter and the signature. * * * "The statutory provision requiring the subscription of the name to be at the end is a wholesome one, and was adopted to remedy real or threatened evils. It should not be frittered away by exceptions" * * * "or by judicial construction" * * * "or defeated by lax interpretation." * * * "The purpose of the law which requires the subscription to be at the end of the will is to prevent fraudulent additions to a will before or after its execution, and the statute should be so construed as to accomplish this purpose." *Younger v. Duffie*, 94 N. Y. 535, 46 Am. Rep. 156.

It is immaterial that there is no charge of fraud in any particular case. A failure to comply with the formalities required by a statute enacted for the prevention of fraud is not excused by showing that in the particular case under consideration there was no fraud. The statute in question was enacted to protect the wills of the dead from alteration. If opportunity

for such alteration is permitted, the fraud may be so deftly accomplished as to prevent its discovery, and for this reason the construction to be given the statute should be such as will control the execution of all wills. "The legislative intent was doubtless to guard against fraud and uncertainty in the testamentary disposition of property by prescribing fixed and certain rules by which to determine the validity of all instruments purporting to be wills of deceased persons." * * *

It is true, as suggested by the appellants, that there is the same opportunity for fraudulent interpolations in the will if the testator should leave sufficient space therefor between the several items of his will. But it is a sufficient answer to this suggestion that the form in which the provisions of a will are drafted is no part of its execution, and that the Legislature has not attempted to prescribe the form in which the testator shall express his testamentary purpose, or in which the will shall be drafted, but only the form in which it is to be "executed and attested." * * * In *Estate of Blake*, 136 Cal. 306, 68 Pac. 827, 89 Am. St. Rep. 135, the testator left a blank space of several lines between the items in which he disposed of his property and the items appointing an executor and revoking his former will. These last items were, however, testamentary provisions (*Sisters of Charity v. Kelly*, 67 N. Y. 415); and, as they constituted a part of his will, the end thereof was not reached until they had been written upon the paper, and, as his name was subscribed to the testamentary clause, which immediately followed these items, it was held that it was subscribed at the end of the will.

A question similar to the one involved herein was presented in *Soward v. Soward*, 1 Duv. 126. The statute of Kentucky required the witnesses, as well as the testator, to "subscribe" the will with their names, which the courts of that state construed to mean that they should write their names at the close of the will. In the will then before the court the witnesses wrote their names, as did the testator in the present case, on the outside or fourth page of the sheet after it had been folded, and across it as so folded. The court held that this was not a compliance with the statute, saying: "So far from subscribing their names to the will, it may be said with much more propriety and accuracy of speech that they merely indorsed the

paper enveloping and inclosing the will, without any accompanying writing or memorandum to indicate the purpose of the indorsement, or showing any connection whatever between the indorsement and the will." In *Roy v. Roy's Ex'r.*, 16 Gratt. (Va.) 418, 84 Am. Dec. 696, the sheet of paper upon which the will was written was folded in the form of a letter, and the words, "David M. Roy's Will," were indorsed upon the back in the handwriting of the deceased at about the middle of the third page when the paper was unfolded. His name was not signed at the end of the writing. The court held that it was not entitled to probate, saying: "It is an unusual mode of signing or authenticating a paper as a concluded act by indorsing the name of the person executing it on the back. Such indorsement is usually made as a label or mark to distinguish it from other papers, and probably it never occurred to the deceased that it was to have any other function in this case." The same rule was followed in *Warwick v. Warwick*, 86 Va. 596, 10 S. E. 843, 6 L. R. A. 775; *Patterson v. Ransom*, 55 Ind. 402.

Whether the deceased intended to execute his will in conformity with the requirements of the statute cannot be shown by parol or extrinsic evidence. Parol evidence cannot be admitted to show that the testator intended the space signed by him to be the end of the will, if, upon an inspection of the instrument, it appears that it is not in fact at the end. Evidence will not be received for the purpose of showing that he intended to comply with the requirements of the statute if it appears upon the face of the instrument that he had not in fact so complied. It must appear upon the face of the will itself that its physical execution is in accordance with these requirements. * * *

Under these considerations, it must be held that the testator did not comply with the requirements of the statute in the execution of his will, and the judgment of the superior court is therefore affirmed. * * *

ANGELLOTTI, J.: I concur. I am of the opinion that the true test by which to determine whether the requirement of our law that the testator shall subscribe his name at the end of the will has been complied with, and the will, therefore, in that respect executed, is as stated in the concurring opinion of the chief justice.

Reference to Another but Unattested Document.**BRYAN'S APPEAL.**

77 Conn. 240, 58 Alt. 748, 68 L. R. A. 353, 107 Am. St. Rep. 34.
1904.

TORRANCE, C. J. The court of probate for the district of New Haven approved and admitted to probate a certain writing as the last will of Philo S. Bennett, deceased. That will contained, as its 12th clause, the following: "I give and bequeath unto my wife, Grace Imogene Bennett, the sum of fifty thousand dollars (\$50,000), in trust, however, for the purposes set forth in a sealed letter which will be found with this will." At the time this will was offered for probate there were also offered for probate as a part of it, under the 12th clause of the will, two writings hereinafter referred to as Exhibits B and C.

The court of probate refused to approve or admit to probate as parts of said will each and both of these exhibits; and from that part of its decree an appeal was taken to the superior court, by William J. Bryan individually, and as trustee under the will as he claims it to be. The will admitted to probate is in the record called Exhibit A; while Exhibits B and C are letters which, as the appellant claims, constitute a part of the will. The will was executed in New York, and is dated the 22d day of May, 1900.

Exhibit B is a letter from the testator to his wife, of which the following is a copy:

"New York, 5/22/1900.

"My Dear Wife: In my will just executed I have bequeathed to you seventy-five thousand dollars (75,000) and the Bridgeport houses, and have in addition to this made you the residuary legatee of a sum which will amount to twenty-five thousand more. This will give you a larger income than you can spend while you live, and will enable you to make bountiful provision for those you desire to remember in your will. In my will you will find the following provisions:

"I give and bequeath unto my wife, Grace Imogene Bennett, the sum of fifty thousand dollars (50,000), in trust, however, for the purposes set forth in a sealed letter which will be found with this will.

“It is my desire that fifty thousand dollars conveyed to you in trust by this provision shall be by you paid to William Jennings Bryan, of Lincoln, Neb., or to his heirs if I survive him. I am earnestly devoted to the political principles which Mr. Bryan advocates, and believe the welfare of the nation depends upon the triumph of those principles. As I am not as able as he to defend those principles with tongue and pen, and as his political work prevents the application of his time and talents to money making, I consider it a duty, as I find it a pleasure, to make this provision for his financial aid, so that he may be more free to devote himself to his chosen field of labor. If for any reason he is unwilling to receive this sum for himself, it is my will that he shall distribute the said sum of fifty thousand dollars according to his judgment among educational and charitable institutions. I have sent a duplicate of this letter to Mr. Bryan, and it is my desire that no one excepting you and Mr. Bryan himself shall know of this letter and bequest. For this reason I place this letter in a sealed envelope, and direct that it shall be opened only by you, and read by you alone. With love and kisses, P. S. Bennett.”

Exhibit C was a typewritten duplicate of Exhibit B, except that the words “with love and kisses, P. S. Bennett,” at the end of Exhibit B, were not contained in Exhibit C, nor was Exhibit C signed by the testator.

Respecting these exhibits the appellant in the Superior Court offered evidence tending to prove the following facts: that about a week or ten days before the date of the will, at the city of Lincoln, Nebraska, the testator, and Mr. Bryan and his wife, prepared a blank draft form of the will, which was subsequently filled out and executed, and that Exhibit C was then also prepared as a blank draft form from which Exhibit B was to be, and was subsequently, drawn; that Exhibit B was in the handwriting of the testator, and was by him placed in a sealed envelope bearing the following indorsement in his handwriting: “Mrs. P. S. Bennett. To be read only by Mrs. Bennett, and by her alone, after my death. P. S. Bennett. (Seal.)”; that the testator, on the day after the date of the will, placed said will and said envelope containing Exhibit B in his box in a vault in the Wool Exchange Building in New York City where they remained as he put them until after his death, the will being

“separate from said letter and said sealed envelope”; and that Exhibit C, from the time it was drawn up, remained in Bennett’s custody till his death, and was found soon after that event among his private papers, in an envelope subscribed in Bennett’s handwriting as follows: “Copy of letter in Safe Deposit Company vault, Wool Exchange.”

The appellant then offered Exhibit C in evidence as part of the will, claiming that it was the original and equivalent of the paper Exhibit B, “and that it was substantially the sealed letter referred to in paragraph 12 of the will.” The court excluded the evidence. The appellant thereupon offered in evidence, as part of the will, the letter Exhibit B, and the court excluded it. The appellant also offered parol evidence tending to prove that Exhibit B was the instrument to which reference was made in clause 12 of the will, but the court excluded such evidence. Subsequently the jury, under the direction of the court, rendered a verdict to the effect that Exhibits B and C “are not either separately or together a part of the last will of said Philo S. Bennett, deceased”; and judgment followed in accordance with the verdict.

From the opinion of the trial court, which is made part of the record, the rulings of the court seem to have been based upon several distinct grounds, which may be briefly indicated: (1) Apparently upon the ground that the doctrine of incorporation by reference does not prevail as to wills, under our statute relating to their making and execution; (2), that even if that doctrine prevails here, no paper in the present will is by reference made a part of it, according to the rules universally applied in jurisdictions where the above doctrine prevails; and (3) that the letter, Exhibit B, shows on its face an intent on the part of the testator that it should not constitute a part of his will.

As we think the rulings of the court below can be vindicated upon the second of the grounds above mentioned, it will be unnecessary to consider the other two grounds; but in thus resting our decision upon the second ground we do not mean to intimate that it could or could not be made to rest upon the first or third.

Before considering the second ground a word or two regarding the first ground may not be out of place. Under the rule prevailing in England, an unattested document may, by refer-

ence in a will, under certain conditions and limitations, become by such reference incorporated in the will as a part of it; and that too whether the document referred to is or is not a depositive one; and one of the leading cases upon this subject is that of *Allen v. Maddock*, 11 Moore's P. C. C. 427, decided in 1858. This is known as the doctrine of incorporation by reference; and the principle upon which it rests does not differ essentially from that which is applied in incorporating unsigned writings in a signed instrument so as to constitute a memorandum in writing under the Statute of Frauds. The English rule appears to prevail in many of our sister States; but the question whether it prevails in this State, and if so, with what limitations and under what conditions, was left undetermined in *Phelps v. Robbins*, 40 Conn. 250, and has never been passed upon since. In the present case we find it unnecessary to decide those questions; but for the purposes of the argument we shall assume, without deciding, that the doctrine of incorporation by reference in a will prevails here.

Two of the conditions, without the existence of which the English rule will not be applied, are concisely, but we think correctly, stated in *Phelps v. Robbins*, *supra* (page 272), as follows: "First, the paper must be in existence at the time of the execution of the will; and, secondly, the description must not be so vague as to be incapable of being applied to any instrument in particular, but must describe the instrument intended in clear and definite terms." In a California case upon this subject this language is used: "But before such an extrinsic document may be so incorporated, the description of it in the will itself must be so clear, explicit and unambiguous as to leave its identity free from doubt." *Estate of Young*, 123 Cal. 337, 342, 55 Pac. 1011.

In an important and well considered English case, decided in 1902, the court uses this language upon this subject: "But it is clear that, in order that the informal document should be incorporated in the validly executed document, the latter must refer to the former as a writing existing—that is, at the time of the execution—in such terms that it may be ascertained.
* * * The document which it is sought to incorporate must be existing at the time of the execution of the document into which it is to be incorporated, and there must be a reference in

the properly executed document to the informal document as an existing one, and not as a future document." In the *Goods of Smart*, L. R. (1902) P. D. 238, 240.

Tested by the rules as thus laid down in the cases above cited, and in numerous others that might be cited, the will in the present case fails to comply with the required conditions under which incorporation by reference can take place in the case of wills. In clause 12 of the will in question here a large sum of money is given to Mrs. Bennett "in trust, however, for the purposes set forth in a sealed letter which will be found with this will." There is not in the language quoted, nor anywhere else in the will, any clear, explicit, unambiguous reference to any specific document as one existing and known to the testator at the time his will was executed. Any sealed letter, or any number of them, setting forth the purposes of the trust, made by anybody, at any time after the will was executed, and "found with the will," would each fully and accurately answer the reference; and if we assume that the reference calls for a letter from the testator, it is answered by such a letter or letters made at any time after the will was drawn. The reference is "so vague as to be incapable of being applied to any instrument in particular" as a document existing at the time of the execution of the will; "the vice is that no particular paper is referred to." *Phelps v. Robbins*, 40 Conn. 250, 273. Such a reference as is made in the present will is, in fact as well as in law, no reference at all; certainly it is not such a reference as the rules under the doctrine of incorporation by reference require in the case of wills.

A reference so defective as the one here in question cannot be helped out by what is called parol evidence; for to allow such evidence to be used for such purpose would be practically to nullify the wise provisions of the law relating to the making and execution of wills. We know of no case, and in the able and helpful briefs filed in this case, have been referred to none, where a reference like the one here in question has been held to incorporate into the will some extrinsic document.

Assuming then, without deciding, that the doctrine of incorporation prevails in this state, as claimed by the appellant, we are still of the opinion that the rulings of which he complains were correct.

Who Takes a Beneficial Interest?**SEARS v. DILLINGHAM.**

12 Mass. 358. 1815.

This was an appeal from a decree of the Judge of Probate of the County of Barnstable, approving and allowing the last will and testament of Thomas Snow, late of Harwich in said county, deceased.

The reason assigned for the appeal, pursuant to the Statute, was that the said testator was not, at the time of executing the supposed will, of sound and disposing mind and memory. All the requisites of the law having been complied with on the part of the appellant, and the appeal having been entered October Term, 1813, at Barnstable, an issue was directed by the court and joined by the parties, to try by jury the sanity of the testator; but the original will not being then produced in court, the cause was continued to the next term, October, 1814, when it proceeded to trial.

The said Dillingham was a subscribing witness to the will, and with Thomas Snow, jun., appointed executor thereof.

Before the trial came on, doubts having been suggested of Dillingham's competency to testify on the trial, although he had no bequest or devise to him in the will, he moved for leave to surrender and resign his appointment and trust of executor to said will.

But it was determined by the court, that having accepted the trust, and given bonds faithfully to perform it, he could not afterwards be permitted to renounce.

At the trial, the said Dillingham was offered on the part of the executors and devisees, as a witness to prove the execution of the will and the sanity of the testator; but on motion of the appellant he was rejected as incompetent, on the ground of his being a party to the process liable to the payment of costs, if the decree of the judge of probate should be reversed.

Upon the testimony of the two other subscribing witnesses, and much other evidence, a verdict was returned upon the issue, that the said testator was of sound and disposing mind and memory at the time of executing the said will.

An objection was then taken by the counsel for the appellant, that the will was not authenticated pursuant to the Statute of 1783, c. 24, Sec. 2, which requires the attestation of three credible witnesses.

The cause, being continued nisi for the consideration of this objection, was argued at this term by Whitman for the appellant, and Thomas for the respondents. In support of the objection it was said that Dillingham, not being a competent witness at the trial, could not be a credible witness to attest the will, the object of the Statute being to require such subscribing witnesses, as could testify at the time of the probate of the will, and afterwards, if necessary, upon appeal to this court.

At the following September Term in Berkshire, the opinion of the court was delivered by

PARKER, C. J. The first question to be decided in this case is, whether Dillingham was rightly rejected as a witness at the trial. For if he ought then to have been admitted, it is obvious that the other objection would be superseded.

The court, which made that decision, was competent to make it definitively, but as there was no opportunity to consult books at the place where the trial was had, it is proper to re-examine the question, so far as may be necessary to settle the point now immediately before us. And we are satisfied that the decision was right in principle, as well as conformable to the practice in this State on the rules of evidence.

It seems that by the common law an executor, who is not residuary legatee, and has no beneficial interests in the estate, may be a witness, to prove the execution of the will and the sanity of the testator; being considered a mere trustee and nominal party, having no real interest in the contest. So likewise a guardian in socage, or a devisee in trust for other persons, may be a witness in support of the will. But it is held that a guardian of record cannot be a witness in favor of his ward: and the reason given is, that he is liable for the costs of the suit, if it should be determined against the ward.

By parity of reason, an executor in this State, who by Statute is liable to costs upon an appeal, is not competent to testify upon a trial for he is not merely a nominal party, but is directly and personally interested in the event of the suit. The

interest may be slight; but it may also be important, as the costs in the case of a will, contested on the ground of the insanity of the testator, are usually not inconsiderable. But this rule has been invariably adhered to in the courts of this State, there being no instance of an executor, administrator, or guardian being admitted to testify, to support actions in favor of the estates they represent: their being parties, and liable eventually to costs, having been always deemed a sufficient objection.

The decision of the court, therefore, against the admission of Dillingham as a witness, was right: and this opens the question intended to be saved for consideration,—whether, as one of the subscribing witnesses was incompetent at the time of the trial, the will was attested by three credible witnesses, pursuant to our Statute, which prescribes the manner of devising lands, tenements and hereditaments.

The construction given to the term credible, as used in the Statute, by this court in the case of *Armory v. Fellowes*, 5 Mass. Rep. 229, is somewhat different from that which was adopted by Lord Mansfield in the celebrated case of *Windham v. Chetwynd*, 1 Bur. 414, in discussing the effect of the same word in the English Statute of Frauds and Perjuries. The meaning of the Statute, according to our decision, is that the will shall be attested by three witnesses who are competent to testify; and this competency must exist at the time of the subscription, and not be acquired by act *ex post facto*; as was settled in England in the case of *Anstey v. Dowsing*, 2 Str. 1253.

It must necessarily follow from the rule, that a subsequent incompetency will not affect the formal execution of the will. Otherwise the commission of a crime, which renders infamous, —or the succession to an estate under a devise, would disable a witness, who was free from any taint of crime or interest at the time of subscribing: a doctrine, which would greatly embarrass the practice of disposing of estates by will, and produce constant uncertainty in the minds of testators, whether their property would be appropriated according to their wishes.

Incompetency to give testimony arises only (except that in some instances a witness is excluded on the ground of policy) from interest and infamy; both of which may arise long after the execution of a will, and frequently without the knowledge

or after the death of the testator. In such cases, proof of the handwriting of the witnesses, who were competent at the time of the attestation, and who cannot be sworn at the trial, or of their actual signing in the presence of the testator, by some witness who remains competent, must be resorted to; or many wills, against which no objection would lie at the time of their execution, would be defeated.

Cases may arise when none of the attesting witnesses can be examined: as if they should all be dead, or should become infamous after the attestation, or should have gone into foreign parts beyond the authority of the State, or the power of the persons interested to obtain depositions. In such cases, there seems to be no reason why the rules of law, which admit of evidence of an inferior character in relation to deeds and other instruments, should not be applicable to a will as to a deed or bond; provided the formalities required by the Statute appear to have been observed.

If then Dillingham was a competent witness at the time he attested the will, there can be now no legal objection to it because of his subsequent incompetency. He appears to derive no interest whatever under the will, not being residuary legatee, or having any devise or bequest in it. He is merely named executor, with another person who is residuary legatee. He could not, even by accepting the trust, acquire any interest; although he might subject himself to some liability, which would render him incompetent afterwards to testify. But this at the time was contingent, and depending altogether upon his assent. Had he died before the testator, the will might have been proved and committed to the other executor to administer alone; or had he renounced the trust, the same disposition would have been made. No person could have been more free from interest, than he was at the time of attestation. He might not have known at the time of signing, that he was named executor in the will. For the witness need not know the contents of the will which he attests: and even the testator might not have known that the person he had named as executor was called as a witness; it not being necessary that he should see the witness face to face.

It was argued, however, that no will can be proved, unless all the subscribing witnesses, who are alive and within the control

of the court, are produced to testify. This, as a general rule, is undoubtedly well settled both here and in England. But there are obvious exceptions, as necessary to be regarded as the rule itself. The case of witnesses having become infamous instantly occurs, as one of the exceptions. They may be alive, and within the control of the court, and yet their testimony cannot be had, and the will may be proved without it. The same reason is applicable to witnesses, who have become interested without the consent of those who claim under the will.

If it be said that such persons may be produced, and the heir may waive his objections to them, and avail himself of their testimony; the same may be said of an executor: and indeed an example is furnished in the present case. It was only at the instance of the heir that Dillingham was rejected, he being in court at the trial and offered as a witness.

We are all of opinion that this will was duly executed according to the Statute: and as the verdict has disaffirmed the reason of appeal, the decree of the judge of probate must be affirmed, with costs for the respondents.

What Is Attestation?

In Re CLAFLIN'S WILL.

75 Vt. 19, 52 Alt. 1053, 58 L. R. A. 261. 1902.

ROWELL, C. J. * * * A more important question arises on the charge where it says that the attesting witnesses must have been informed and have known that it was Clafin's will that they were then and there asked to witness and attest; that, if he concealed from them the fact that it was his will, they did not attest his will; that it was necessary when they signed the will as witnesses that they should know they were signing as witnesses to his will; that they must have been informed of that in some way, and have understood it when they signed.

It appears that the will, including the attestation clause, was written and signed by the testator; that he superintended its execution, and that the attesting witnesses subscribed it at his

request and in his presence; but whether in the presence of one another was the important question.

Under statutes like ours, which provide that wills must be "attested and subscribed by three or more credible witnesses in the presence of the testator and of each other," it is very generally held in this country that the witnesses need not know that the instrument they were attesting is a will, because such statutes are construed not to require it; and it is a question of construction, and nothing more.

The English Statute of Frauds (29 Car. II, c. 3, Sec. 5), before its modification by 1 Vict. c. 26, Sec. 9, required wills of lands and tenements to be "attested and subscribed" in the presence of the testator by three or four credible witnesses; and it was always held in England under that statute that the witnesses need not know that the instrument was a will.

In *White v. Trustees of the British Museum*, 6 Bing. 310, only one of the witnesses knew the nature of the instrument; and it was argued that, if such a subscription of their names satisfied the statute, the word "attested" would have no force whatever, and might as well have been omitted. But the court said the question was whether there was an acknowledgment in fact by the testator to the subscribing witnesses, though there was none in words, that the instrument was his will; for if, it said, by what the testator did, he must, in common understanding and reasonable construction, be taken to have acknowledged the instrument to be his will, the attestation thereof must be considered as complete within the principle and authority of *Ellis v. Smith*, 1 Ves. Jr. 11, decided in 1754. And it appearing that the testator knew the instrument to be his will, as it was written and signed by him; that he produced it to the three persons, and asked them to sign it, intending they should sign it as witnesses; that they subscribed their names thereto in his presence, and returned the same identical paper to him,—it was held that he acknowledged in fact to the witnesses, though not in words, that the instrument was his will, and that its execution was good under the statute, for, the court said, whatever might have been the doubt as to the true construction of the statute, the law was then fully settled that the testator need not sign his name in the presence of the witnesses, but that a bare acknowledgment of his handwriting is a sufficient signature to

make their attestation and subscription good within the statute, though such acknowledgment conveys no intimation whatever, nor means of knowledge, either of the nature of the instrument or the testator's object in signing it; and that the facts of that case placed the testator and the witnesses in the same relation as though an oral acknowledgment of his signature had been made.

The same thing is held in *Wright v. Wright*, 7 Bing. 457. In *Trimmer v. Jackson*, 4 Burn. Ecc. Law (3d Ed.) 102, a will was established where the testator purposely misled the witnesses into supposing that it was a deed.

In Massachusetts they hold as they do in England, under a statute like ours in this respect. Thus, in *Osborn v. Cook*, 11 Cush. 532, 59 Am. Dec. 155, the testator signed the instrument in the presence of two of the witnesses, and pointed out his signature to the third witness, and each of the witnesses signed the instrument as a witness in the presence of the testator and at his request; but the testator did not disclose to any of the witnesses that it was his will, nor did any of them know or suspect the nature of the instrument, and yet it was held well executed. The court said that calling on the witnesses to attest his execution of an instrument, the character and contents of which he well knew was, in effect, a declaration that the instrument he had signed, and his signature to which he desired them to attest, was his act, though the character of the instrument was not disclosed to them; that it was as if the testator had said: "This instrument is my act. It expresses my wish and purpose, and, though I do not tell you what it is, I desire you to attest that it is my act, and that I have executed and recognized it as such in your presence," that the legislature had prescribed certain solemnities to be observed in the execution of a will that it may be seen that it is the free, conscious, intelligent act of the maker, but that it had not prescribed that he should publish to the world nor to the witnesses what is in the will, nor even that it is a will.

Connecticut holds the same way, where the statute requires a will to be in writing, subscribed by the testator, and attested by three witnesses, all of them subscribing in his presence and in the presence of each other. *Appeal of Canada*, 47 Conn. 450. It is there said that the primary reason for requiring the pres-

ence of the witness is that he should be able to say that the testator put his name upon the identical piece of paper upon which he put his own; that the witness identifies the paper by the conjunction of the two signatures, not by the character of its contents. *Allen v. Griffin*, 69 Wis. 529, 35 N. W. 21, is to the same effect.

In *Re Hulse's Will*, 52 Iowa 662, 3 N. W. 734, the same is held. There the statute requires a will to be witnessed by two competent witnesses. The court said that to witness means "to see the execution of an instrument, and to subscribe it for the purpose of establishing its authenticity," and referred to the English Statute of Frauds as containing a similar provision, and said it had been construed as not requiring publication in the sense of acquainting the witnesses with the nature of the instrument.

In *Watson v. Pipes*, 32 Miss. 451, the same is held under a statute taken from 29 Car. II. The court said that such seemed to be the holding in all the states in which the provisions of the English statute in regard to wills have been adopted; that the rule is based upon the plain and obvious construction of the statute, which it did not hesitate to adopt.

The Alabama Code requires wills to be "attested by at least two witnesses, who must subscribe their names thereto in the presence of the testator." The predecessor of this statute was borrowed from 29 Car. II, c. 3, Sec. 5. In *Barnewall v. Murrell*, 108 Ala. 366, 18 South. 831, the court said that, as the statute did not require the testator to inform the attesting witnesses that the instrument was his will, it was immaterial to the due execution of the will in that case whether the testatrix made any declaration to the attesting witnesses, or gave them any notice or information, that the instrument was her will.

In *Schouler, Wills* (3d ed.), Sec. 326, it is said to be the long-established doctrine, both of England and the United States, that, independently of an express statute requiring publication, a will may be duly executed without any formal announcement by the testator of a testamentary purpose, and without anything being said by him to show the nature of the instrument the witnesses are called upon to subscribe; that the maker's signature *animo testandi*, and his proper acknowledgment, showing that he has put his name *bona fide* upon the paper that

he desires witnessed, when he has not signed in their presence, renders the execution valid in general, without any other or more formal execution; and that the signature of the witnesses being duly affixed, the act of execution becomes complete.

In Missouri, under a statute that is almost an exact transcript of 29 Car. II, c. 3, Sec. 5, they hold that there must be some declaration by the testator that the paper is his will; but that it need not be verbal,—that an act or a sign is enough; but that the witnesses must know it is the will of the testator, and witness it at his request. *Odenwaelder v. Schoor*, 8 Mo. App. 458. In support of this construction of the statute, *Mundy v. Mundy*, 15 N. J. Eq. 290, is referred to. But that case was decided under a statute that expressly required that the instrument should be “declared to be” the last will and testament of the testator; so no authority for the holding.

The contestants rely much upon *Swift v. Wiley*, 1 B. Mon. (Ky.) 114, where it is said that to attest the publication of a paper as a will, and to subscribe thereto the names of the witnesses, are very different things, and required for different ends; that attestation is an act of the mind, subscription an act of the hand; that to attest a will is to know that it is published as such, but to subscribe it is only to write on the paper the names of the witnesses for the sole purpose of identification. But this case is of little worth, for *Flood v. Pragoff*, 79 Ky. 607, expressly decides that it is not necessary that the witnesses should know the nature of the instrument, and says that the question never before arose in that state; and it hardly could have arisen in *Swift v. Wiley*, for there was a publication there by the testator, at which the witnesses were present. It is said in *Flood v. Pragoff* that the Legislature had prescribed such formalities for the execution of wills as it thought proper, and that the court ought not to add to them by construction, especially when the efficacy of the constructive requirement depended solely upon the memory of the subscribing witnesses.

Illinois and Wisconsin repudiate the idea that there is any difference between attesting and subscribing a will. *Drury v. Connell*, 177 Ill. 43, 52 N. E. 368; *Sloan v. Sloan*, 184 Ill. 579, 56 N. E. 952; *Skinner v. Society*, 92 Wis. 209, 65 N. W. 1037.

Dr. Lushington said in *Bryan v. White*, 2 Rob. Ecc. 315, that he felt no difficulty in answering the question, what is the

meaning of "shall attest"? that attest means that the person shall be present and see what passes, and shall, when required, bear witness to the facts. Lord Chancellor Selborne said in *Seal v. Claridge* (1881), 50 Law J. 316, that: "Surely the very words 'ad testari' imply the presence of a witness standing by, who is not a party to the deed to be witnessed." Other English cases say that to attest an instrument is not merely to subscribe one's name to it as having been present at its execution, but includes also, essentially, the presence in fact at its execution of some disinterested person capable of giving evidence of what took place. *Roberts v. Phillips* (1855) 4 El. & Bl. 450; *Ford v. Kettle* (1882), 9 Q. B. Div. 139. Dr. Lushington somewhere illustrates that as a notary, by his attestation of protest, bears witness, not to the statements in the protest, but to the fact of making those statements, so the witnesses to a will bear witness to all the statute requires attesting witnesses to attest, namely, that the signature was made or acknowledged in their presence.

Judge Redfield, both in his work and his cases on Wills, strenuously contends that the witnesses must know the nature of the instrument; otherwise, he asks, what becomes of all that is said about the great solemnity the law attaches to the formal execution of wills, and how are the witnesses charged with the duty of seeing that the testator is of sound mind before they consent to attest the instrument, which, it is sometimes said, commits them to having attested that fact as well as the formal signature of the testator?

As to the "solemnity," the formal execution of wills being mere matter of statutory requirement, whatever has been said about it dehors the statute goes for nothing. As to the witnesses being charged with the duty of seeing that the testator is of sound mind, the statute does not thus charge them, unless by the word "attested"; and, if that word charges that duty, it must, it would seem, charge the further duty of seeing that he is of full age, for that is as essential under our statute as a sound mind. But the word "attested" does not charge the duty claimed, as is shown by *Thornton's Ex'rs v. Thornton's Heirs*, above cited. There it was contended that the weight to be given to the testimony of an attesting witness to a will is a matter of law, and that, therefore, the trial court was bound to charge, as

requested, that such testimony is "entitled to much consideration on the question of capacity." But this court said that the law gives no weight to the testimony of such a witness beyond what it would be entitled to under the conditions that usually govern the value of testimony; that the prominence given to such testimony in opinions where both law and fact are discussed, arises from the witness' acknowledged opportunity for observation at the precise time in question, and from the probability of his having used the opportunity on account of his participation in the transaction; that it is because of his opportunity, not because he wrote his name on the instrument, that his testimony is usually listened to with attention; but that the law attaches no fictitious official weight to the testimony, so as to pass it for more than it is worth, but that its value is to be determined by the rules applicable to other testimony.

In *Dean v. Dean's Heirs*, 27 Vt. 746, it is said that attesting a will by the witnesses is an attestation of its publication; that a formal publication is not necessary; that writing and signing a will is sufficient publication; indeed, that any act of the testator's by which he designates that he means to give effect to the paper as his will, is a publication of the will itself. Nothing in this, except the words "as his will," indicates that the publication must be such as to inform the witnesses of the testamentary character of the instrument. And these evidently do not mean that, for it had just been said that writing and signing the will was a sufficient publication, and that suggests no such idea. They mean no more than is said in *Roberts v. Welch*, 46 Vt. 164, that a declaration by the testator to the witnesses that it is his will or his instrument is enough. Otherwise the court was running counter to the established construction of 29 Car. II, concerning which the court had a few years before said in *Adams v. Field*, 21 Vt. 266, that "when our Statute of Wills was enacted that statute of 29 Car. II had received a long-fixed and well-known construction; and when we adopt an English statute we take it with the construction that it has received, on the ground that this was the implied intention of the Legislature."

But it is proper to remark in this connection that what is said in *Dean v. Dean's Heirs* is entirely obiter, as the only question was whether the testimony warranted the finding that the

will was executed by the testator in the presence of the witnesses, and subscribed by them in his presence and in the presence of each other.

In *Roberts v. Welch*, 46 Vt. 164, one of the witnesses did not know that the testator had signed the paper at all, nor what the paper was, nor for what purpose he himself was signing it. The court said that, although it was not necessary for the testator to sign in the presence of the witnesses, but that a declaration to the witnesses that it was his will or his instrument would be enough, yet that the witnesses must know that by affixing their names to the instrument they were attesting its execution by the testator; that a person, to become an attesting witness, must be aware of the character of the act he is called upon to perform, and must subscribe his name *animo testandi*. As nothing is said about the fact that the witness did not know the character of the instrument, it is manifest that the court did not regard it essential that he should know it, but only that he should know the character of his own act, and to that end should know that the testator had signed the paper. This gives force to the word "attested" in the statute, and makes it more than "subscribed"; makes it a mental act, but applies it in essentiality only to the execution of the instrument, not to a knowledge of its character.

But it is claimed that in this very case, when it was here before (73 Vt. 129, 50 Atl. 815, 87 Am. St. Rep. 693), we said the witnesses must know the character of the instrument. The language most relied upon in support of the claim is this: "Nor was it necessary to show by the attesting witnesses that at the time they signed they knew they were signing the testator's will. This fact, though necessary (*Roberts v. Welch*, 46 Vt. 164), may be shown by other witnesses, or it may be inferred from the circumstances." This language, when taken in connection with the case to which it refers and the context, does not mean, we think, what is claimed for it. The case referred to, as we have seen, does not require that the witnesses must know that the instrument is the testator's will, but only that it is his instrument, and that by affixing their names to it they are attesting its execution as such by the testator.

And when we look at the context we see that no more was meant, for therein the court had said that writing and signing

the will and superintending its execution was a sufficient publication by the testator, and that in attesting it the witness attested its publication; and therewith agree the cases. But there is no intimation that the witnesses must know the character of the instrument. And the quotation from *Hott v. Genge*, 3 *Cutt. Ecc.* 181, is to the same effect, for, although it says that when a testator writes the will himself, and signs it, and produces it to the witnesses, and desires them to sign their names, that amounts to an acknowledgment on his part that the paper signed by them is his will; yet this is not saying that the witnesses thereby know it to be his will, but only that he himself knows it. That case arose under the Statute of 1 Vict., under which it had always been held that, when the signature of the testator is seen or expressly acknowledged, it is not material that the witnesses are not told that the instrument is a will.

We hold, therefore, that our statute does not require that the attesting witnesses to a will shall know the nature of the instrument.

It appeared that the witnesses were in the store of one of them when they signed, but it did not appear how large the room was, except that it was a country general store. The jury asked if it was enough that the witnesses were in the same room. The court replied that merely being in the same room was not enough; the room might have been so large; that the witnesses must have been together in the presence of one another in such a way and in such a sense that they could see one another sign, whether they actually looked and saw or not; that they must have been right there where they could see one another sign. This is in substantial accord with *Blanchard's Heirs v. Blanchard's Heirs*, 32 *Vt.* 62, and so no error. Reversed and remanded.

Attestation Must Be in the Presence of the Testator.

CUNNINGHAM v. CUNNINGHAM ET AL.

80 *Minn.* 180, 183 *N. W.* 58, 51 *L. R. A.* 642, 81 *Am. St. Rep.* 256.
1900.

COLLINS, J. *Gen. St.* 1894, Sec. 4426, provides: "No will, except such nuncupative wills as are hereinafter mentioned,

shall be effectual to pass any estate, real or personal, or to change, or in any way affect the same, unless it is in writing, and signed at the end thereof, by the testator, or by some person in his presence, and by his express direction, and attested and subscribed in his presence, by two or more competent witnesses." And the only question in issue on this appeal is whether the alleged will was attested and subscribed in the presence of the testator, Cunningham, by the two persons whose names were attached as witnesses.

The testator had been confined to his room for some time. It was a small bedroom with a doorway which led into a large room upon the north, the head of his bed being near the partition between the two. There was no door, but a curtain had been hung in the doorway, which was drawn to the west side at the time in question. Three days before the signing the testator sent for his attending physician, Dr. Adams, to come to his house, and draw his will. At the same time he sent for Dr. Dugan to be present as a witness. The draft of a will made by Dr. Adams as dictated by Cunningham was unsatisfactory, and both physicians went away. They were again summoned November 12, 1899, and went to the house in the forenoon. Dr. Adams drew a new will as instructed by Cunningham, the latter remaining in his bed. When the document was fully written, both men stepped to the bedside, and Dr. Adams read it to the sick man. Having heard it read through, Cunningham pronounced it satisfactory, and then signed it. When so signing he sat on the edge of the bed, and used as a place for the paper a large book which was lying upon a chair. Drs. Adams and Dugan were then requested to sign as witnesses. For this purpose they stepped to a table in the sitting room, which stood about 10 feet from where Cunningham sat, and there affixed their signatures. The time occupied in so signing did not exceed two minutes, and immediately thereafter Dr. Adams returned to the bedside with the paper. Dr. Dugan stepped to the doorway, about three feet from Cunningham, and then Adams showed the signatures of the witnesses to him as he sat on the edge of the bed. Cunningham took the paper, looked it over, and said, in effect, that it was all right. From where he sat he could not see the table which was used by the witnesses when signing. He could have seen it by moving two

or three feet. While they were signing he leaned forward, and inquired if the instrument needed a revenue stamp, to which Dr. Adams replied that he did not know, the reply being audible to Cunningham.

These are the salient and controlling facts found by the court below, on which it based an ultimate finding that the instrument so witnessed was attested and subscribed in the presence of the testator, and then affirmed the order of the probate court admitting it to probate as the last will and testament of the deceased.

The appellants (contestants below) insist that the attestation and subscription by the witnesses were insufficient, because Mr. Cunningham did not and could not see the witnesses subscribe their names from where he sat, and their contention has an abundance of authority in support of it from jurisdictions in which statutes copied from the English law on the subject, and exactly like our own, are in force. The rule laid down in these authorities is that the attesting and subscribing by the witnesses must take place within the testator's range of vision, so that he may see the act of subscribing, if he wishes, without a material change of his position; and that he must be mentally observant of the act while in progress.

Lord Ellenborough thus stated it in *Doe v. Manfold*, 1 Maule & S. 294: "In favor of attestation it is presumed that, if the testator might see; he did see; but I am afraid if we went beyond the rule which required that the witness should be actually within reach of the organs of sight, we shall be giving effect to an attestation out of the deviser's presence, as to which the rule is that, where the deviser cannot, by possibility, see the act doing, that is an act out of his presence."

Construing the same words in the Illinois statute, it was recently held: "The act of attestation consists in the subscription of the names of the witnesses to the attestation clause as a declaration that the signature was made or acknowledged in their presence. It is this act of attestation by subscribing their names to the will as witnesses thereto which the statute requires to be in the presence of the testator. The object of the law, as frequently declared, is to prevent fraud or imposition upon the testator, or the substitution of a surreptitious will; and to effectuate that object it is necessary that the testator shall be

able to see and know that the witnesses subscribed their names to the paper which he has executed or acknowledged as his will. The purpose of the statute is not attained by mere ability to see the witnesses, or some part of them, but the act of attestation is the thing which must be in the presence of the testator.

* * * It would not be an attestation in the presence of the testator, if he could not see the attestation, but merely understood from the surrounding circumstances that the act was taking place." *Drury v. Connell*, 177 Ill. 43, 52 N. E. 368.

In brief, the courts have, almost without exception, construed a statute requiring an attestation of a will to be in the "presence" of the testator to mean that there must not only be a consciousness on the part of the latter as to the act of the witnesses while it is being performed, but a contiguity of persons, with an opportunity for the testator to see the actual subscribing of the names of the witnesses, if he chooses, without any material change of position on his part. And yet an examination of the decided cases wherein the ever-varying circumstances and conditions have been considered, and this rule applied, will convince the reader that the task of application has not been an easy one, and has led to surprising results at times. Some years ago a large number of American and English cases were collected in a note appended to *Mandeville v. Parker*, 31 N. J. Eq. 242, and an examination thereof will show the absurd and inconsistent positions in which the courts have frequently placed themselves.

As will be seen from the facts surrounding the cases mentioned in this note, or cited in the text-books in support of this rule, it has been held almost universally that an attestation in the same room with the testator is good, without regard to intervening objects which might or did intercept the view; and also that an attestation outside the room or place where the testator sat or lay is valid if actually within his range of vision. And no court seems to have doubted that a man unable to see at all could properly make a will under the statute, if the witnesses attested within his "conscious" presence, whatever that means. Exactly why or how an exception in the case of one temporarily or permanently blind can be injected into this statute has not been attempted by any court or writer, so far as we know. Nor has there been any success in the effort to

show why one kind of an intervening object—a partition wall, for instance—is better calculated to afford an opportunity for the perpetration of a fraud upon the testator than is another kind, say, the closed curtains of an old-fashioned bed, or the head or foot board of a bedstead, or any other article of furniture which happens to be an obstruction to the sight.

Again, it is difficult to see what sound distinction can be made, when applying the rule, between a case where the testator can see the witnesses attest, if he chooses to lean his body forward a few inches, and the case where the act can be seen if he steps forward the same distance. Or, take a case where a testator has been injured, and is compelled to lie on his back with his eyes fixed on the ceiling. Must the witnesses affix their signatures from an elevation in order to sign in his presence? No case has gone that far, and yet what difference would it make with such a testator in fact or in sound reason if the will was attested 10 feet distant, on a table in an adjoining room, or on a table the same distance from the bed, but in the same room?

Take the case at bar. The testator sat on the edge of his bed when the witnesses signed at the table in the adjoining room, a few feet distant, and within easy sound of his voice. If he could have seen them by leaning forward, the authorities in favor of upholding the will are abundant. Physically he was capable of stepping two or three feet forward, and from this point the witnesses would have been within his range of vision. It is extremely difficult to distinguish between the two cases, and yet it has been done again and again in applying the rule.

We might continue these suggestions and queries, as has been done quite frequently by courts which have not been entirely satisfied with a very rigid construction of the statute, and have not hesitated to say so; but it seems unnecessary, for there is one feature in these findings of fact which is sufficient in our judgment, to warn an affirmance, although there are many decisions to the contrary. As before stated, the court found that the witnessing of the will consumed not more than two minutes, and that immediately thereafter Dr. Adams returned to the testator while Dr. Dugan came to the doorway, not over five feet distant, whereupon the former “showed the signatures of the witnesses to the testator. The latter took the will, looked it over, and said in effect that it was all right.”

To say that this was not a sufficient attestation within a statute which requires such attestation to be in the "presence" of the testator, simply because the witnesses actually signed a few feet out of the range of his vision, is to be extremely technical without the slightest reason for being so. The signing was within the sound of the testator's voice; he knew what was being done; the act occupied not more than two minutes; the witnesses returned at once to the testator; their signatures were pointed out to him; he took the instrument into his own hands, looked it over, and pronounced it satisfactory. The whole affair, from the time he signed the will himself down to and including his expression of approval, was a single and entire transaction; and no narrow construction of this statute, even if it has met the approval of the courts, should be allowed to stand in the way of right and justice, or be permitted to defeat a testator's disposition of his own property.

In *Cook v. Winchester*, 81 Mich. 581, 46 N. W. 106, 8 L. R. A. 822, it was said: "In the definition of the phrase 'in the presence of' due regard must be had to the circumstances of each particular case, as it is well settled by all the authorities that the statute does not require absolutely that the witnessing must be done in the actual sight of the testator, nor yet within the same room with him. If, as before shown, they sign within his hearing, knowledge, and understanding, and so near as not to be substantially away from him, they are considered to be in his presence."

But, as was said, in substance, in the same case, we agree that this will was validly executed expressly on the ground that the whole transaction was an entirety in fact, and that, immediately after the witnesses had attested, the instrument was returned by them to the hands of the testator, his attention was called to their signatures, and he expressed his satisfaction and approval of what had been done. This view, which does no violence to the spirit and intent of the statute, is not without precedent and authority aside from the Michigan case, although it may, as said by the court below, run contrary to a majority of the decisions. See *Sturdivant v. Birchett*, 10 Gratt. (Va.) 67, and *Riggs v. Riggs*, 135 Mass. 238, 46 Am. Rep. 464.

Judgment affirmed.

In Re BEGGANS' WILL.

68 N. J. Eq. 572, 59 Atl. 874. 1905.

MAGIE, ORDINARY. * * * The attestation clause appended to the paper was not in the usual form. It reads thus: "We, the undersigned, witnessed Mrs. Ann Beggans sign this paper, which she declared and acknowledged to be her last will and testament. Michael B. Holmes. Peter F. Maguire."

* * * * *

When an attestation clause states the performance of some of the requisite acts, but omits to state the performance of acts also requisite, on reason and authority the proponent must establish by evidence the performance of the latter acts. Ayres v. Ayres, 43 N. J. Eq. 565, 12 Atl. 621.

It will be observed that by the attestation clause now under consideration the subscribing witnesses assert the performance of two requisite acts thus: (1) That the deceased "declared" the disputed paper "to be her last will and testament," and (2) that they "witnessed" the deceased "sign this paper." They wholly omit to certify that they subscribed their names thereto in the presence of deceased. This requisite of the statute is designed to prevent substitution and fraud upon an intending testator (*Mandeville v. Parker*, 31 N. J. Eq. 242), and no amount of proof that the very paper signed by deceased was that which the subscribing witnesses signed will avail to establish it as a will if it fails to show that their signatures were affixed in the presence of the deceased.

* * * * *

The third question is whether proponent's proof establishes the fact that the witnesses subscribed their names to the paper in the presence of deceased.

On this subject the attestation clause is silent, and the subscribing witnesses are again at variance. Both, however, agree that their act of subscribing was not done in the room in which deceased was, but in the adjoining room, at a table therein. They disagree as to the position of the table at that time, Maguire asserting that it was in the center of that room, and Holmes asserting that it was on one side of that room. It is conceded that if it was in the center deceased could not have

seen the act of the witnesses in subscribing, while if it was on the side, as fixed by Holmes, the deceased could have seen the act if she had turned in that direction.

A diagram of the bedroom and of the adjoining room and the various pieces of furniture therein was put in evidence. It was made under the instruction of the daughter of the deceased, who is the principal beneficiary under the will. She placed the table at which Holmes said the witnesses signed in the position in which she says it was at the time. Assuming that the daughter correctly pointed out to the draftsman of the plan the respective positions of the furniture, it thereby appears that deceased, who was ill, was lying in a bed, the head of which was against the partition between the bedroom and the adjoining room. The door between those rooms was a sliding door, and open. The table in the adjoining room was in such a position as to leave a possible vision to one lying on the bed for a width of three and one-half feet. But in order to see the act of the witnesses in subscribing, the deceased would have been obliged not only to turn her head, but to look, as it were, above her head. If deceased was sitting up in the bed, she would have been obliged to turn her head over her shoulder in order to see the witnesses.

There is no satisfactory proof as to which position deceased was in when the signatures of the witnesses were made, and no proof at all that she turned her head, or placed herself in a position to see that act.

In *Mandeville v. Parker*, 31 N. J. Eq. 244, Chancellor Runyon declared that under our statute requiring the subscribing witnesses to a will to sign in the presence of the testator an attestation in the same room in which testator is, is *prima facie* an attestation in his presence, and, on the other hand, an attestation made in another room is *prima facie* not made in his presence.

In *Ayres v. Ayres*, 43 N. J. Eq. 565, 12 Atl. 621, Chancellor McGill applied that doctrine to a case in which the witnesses' signatures were affixed in the same room, upon a bureau at the foot of the bed on which deceased was lying. Upon the proofs he found that deceased at the time was so supported that he could see the motions of the pen used by the witnesses, though he could not distinguish the letters the pen was forming,

and that his eyes were open during the signing; and he held that the signing under those circumstances was a sufficient compliance with the statute.

If, in the case in hand, it had been made to appear that the deceased placed herself in a position to see the witnesses signing, and was looking in that direction, it may be that the presumption that the signing in the adjoining room was not a signing in her presence would have been overcome. But, in the absence of such proof, the presumption is not overcome. If Holmes is correct in his description of the place of signing by the witnesses, the signing is not shown to be a sufficient compliance with the statute. If Maguire is correct, the signing could not have been seen by deceased. The decree is therefore supported on this ground. * * *

CHAPTER VIII.

REVOCATION OF WILLS.

By Subsequent Instrument.

SIMPSON v. FOXON.

P. 54 (Eng.). 1907.

On March 15, 1898, John Foxon made a will disposing of all of his property and appointing his daughter executrix. On September 11, 1903, he duly executed as a will a document on a printed form commencing: "This is the last and only will and testament of me, John Foxon." This document disposed of only a life insurance policy of £4 13s and appointed William Biggs executor. On April 11, 1905, he duly executed as a codicil a further document described as "a codicil to the last will." This codicil gave certain bequests, revoked all previous appointments of executors and trustees, and appointed Herbert Simpson and William Biggs to be joint executors and trustees "of my will."

SIR GORELL BARNES, PRESIDENT. There is no doubt to my mind that, as a matter of fact, the deceased cannot really have intended the policy form of will to have been a revocation of his general dispositions and to have left himself intestate as to the greater part of his property. I do not suppose that anyone, having these facts before him, could come to the conclusion that the deceased did so intend.

But what a man intends and the expression of his intention are two different things. He is bound, and those who take after him are bound by his expressed intention. If that expressed intention is unfortunately different from what he really desires, so much the worse for those who wish the actual intention to prevail. The principle has been very fully considered in a number of authorities. I think there is a good deal more authority than was stated to me in the arguments. The numer-

ous authorities reported, such, for instance as *Plenty v. West* (1845), 4 Notes of Cases, 103, 1 Rob. 264, where the words in question were "this is the last will," arose out of some difference of opinion which existed in former days as to the effect to be given to those words, but which may safely be considered as set at rest by the later decisions. The words "the last will" would not revoke a former will, if not inconsistent with it; the last will might even tend to confirm what had gone before. And so it is necessary to see what are the provisions in the last will, and if these provisions are inconsistent with those in the earlier document it may be that the later revokes the earlier one. But it does not necessarily follow that it always will do so if the two documents can stand properly together.

The principle to be generally applied in considering matters of this kind is very well stated in *Lemage v. Goodban* (1865), L. R. 1 P. & D. 57, at page 62, where Lord Penzance, quoting from *Williams on Executors* (6th Ed.) p. 156 (in 10th Ed. pp. 119, 120), says: "The mere fact of making a subsequent testamentary paper does not work a total revocation of a prior one, unless the latter expressly, or in effect, revoke the former, or the two be incapable of standing together; for though it be a maxim, as Swinburne says above, that as no man can die with two testaments, yet any number of instruments, whatever form they may be (so as they be all clearly testamentary), may be admitted to probate, as together containing the last will of the deceased. And if a subsequent testamentary paper be partly inconsistent with one of an earlier date, then such latter instrument will revoke the former, as to those parts only, where they are inconsistent." The learned judge added: "This passage truly represents the result of the authorities;" and he continued as follows: "The will of a man is the aggregate of his testamentary intentions, so far as they are manifested in writing, duly executed according to the statute. And as a will, if contained in one document, may be of several sheets, so it may consist of several independent papers, each so executed. Redundancy or repetition in such independent papers will no more necessarily vitiate any of them, than similar defects if appearing on the face of a single document. Now it was argued that in the case of more than one testamentary paper, each professing in form to be the last will of the deceased, it is

necessary for the court, before concluding that they together constitute the will, to be satisfied that the testator intended them to operate together as such. In one sense this is true, for the intention of the testator in the matter is the sole guide and control. But the 'intention' to be sought and discovered relates to the disposition of the testator's property, not which, or what number, of papers did he desire or expect to be admitted to probate?—is the true question. And so this court has been in the habit of admitting to probate such, and as many papers (all properly executed) as are necessary to effect the testator's full wishes, and of solving the question of revocation by considering not what papers have been apparently superseded by the act of executing others, but what dispositions it can be collected from the language of all the papers that the testator designed to revoke or to retain."

That being the principle which seems to me applicable to the present case, I do not feel any difficulty in arriving at a decision upon it. In my opinion all three documents should be admitted to probate. I do not think, having regard to the circumstances which these testamentary papers disclose, that the words "last and only" can be taken as revoking what had been done by the previous will.

The document which contains the words in question is a printed form, evidently drawn up for the purpose of disposing of a policy of assurance only and appointing an executor to deal with that matter only. It is very unfortunate that it should have been drawn in this way, but it is, notwithstanding the words "and only," not intended to be a complete disposition of the testator's property.

If the other view were adopted it would lead to this, that apart from the insurance money, the whole of this man's property would remain undealt with, except as to what is disposed of by the codicil, although the testator cannot possibly have had any idea that he had not disposed or was not disposing of all that he could have dealt with.

The words "last and only" cannot be treated as an express revocation; and, applying the principles I have already referred to, the dispositions of this man's property seem to me to show that the document in question was not intended by him to be, and it is not, upon its face, a controlling and revoking disposi-

tion. In other words, neither by express intention nor by disposition of property can you gather that the words "and only" are to be treated as a revocation of the earlier will.

I grant probate of all three documents. The costs must, of course, come out of the estate.

By Destruction.

MILES' APPEAL.

68 Conn. 237. 1896.

FENN, J. Dianna M. Miles, late of Milford, in this State, died in 1891, being then about eighty-six years of age. She left a will dated and executed February 13th, 1879. This will, in addition to the formal parts and the clause appointing an executor, contained two sections only, which are as follows:—

"*First.* After all my lawful debts are paid and discharged I give, devise, and bequeath to my nieces, Susan Whittlesey and Isabel Newton, daughters of my brother, Charles, to each of them ten shares of the capital stock of The New York, New Haven & Hartford Railroad Company, being in all twenty shares of said capital stock, of the par value of one hundred dollars each, to them, their heirs and assigns forever.

"*Second.* I give, devise, and bequeath all the residue and remainder of my property and estate, both real and personal, of whatever kind and nature, to my brothers, Charles, David, and Henry Carrington Miles, share and share alike, to them, their heirs and assigns forever."

When this will was presented in the Court of Probate, lines appeared drawn through all that part of the above recited first section, after the words, "First. After all my lawful debts are paid and discharged I;" that is to say, commencing with the word "give," and ending with the word "forever." The words over which said lines were drawn were in no other manner canceled or obliterated, but remained perfectly legible.

The case came to the Superior Court on an appeal from an order and decree of the Court of Probate for the district of Milford, denying the application of the then appellants, that the words and clauses above referred to, through which lines were

drawn, be admitted to probate, and in disapproving and disallowing said words and clauses, and in proving, approving, allowing and admitting to probate said will without said words and clauses. The Superior Court rendered judgment reversing the decree of the Court of Probate. From this judgment the original appellees appealed to this court. They thus in turn became appellants, and will be so regarded and styled in this opinion. The original appellants will be called the appellees.

Upon the trial in the Superior Court no exceptions to rulings upon evidence, or to anything which occurred during the presentation of the case, were taken. The court made a finding of the facts upon which its judgment was based, and the sole questions of law relate to the sufficiency of said finding to support and vindicate such judgment. The claims made by the appellants are stated in the finding, and were: that the facts found were sufficient in law to establish the fact that either the testatrix herself made said erasures, or caused the same to be made in her presence, and that upon said facts found the erasures in question constituted a valid revocation of said bequest in said will; that the legal presumption was that said erasures were made by the testatrix, and that the burden of proof was upon the appellants to show that said erasures were not made by her, or by some person in her presence by her direction. The appellees claimed otherwise, and further, that a portion of a will could not in this manner be revoked under the statute of this State.

The statute referred to, in force at the time the will in question was made, is now part of General Statutes, § 542. It provides: "No will or codicil shall be revoked in any other manner except by burning, canceling, tearing, or obliterating it by the testator or by some person in his presence by his direction or by a later will or codicil." There must of course in any given case be a will, otherwise valid and operative, before the question as to how it may be revoked will arise. There was one here, but lines had been drawn through a certain portion of it after execution, and before exhibition in the Court of Probate. The sole inquiry was: Did this fact operate as a revocation, not indeed of the entire will, but of that portion of it? It could not so operate unless the requirements of the statute had been complied with. Waiving for the time the question whether such

cancellation, however effected, would constitute such partial revocation, it remains that in order to do it the act must be done by the testator, or by some person in his presence by his direction. Unless this be found, no finding that would justify a revocation exists. The court has made no such finding in this case. On the contrary the judge said: "I do not find that said erasures were made by the testatrix or in her presence."

But the appellants urge that the court did find certain evidential facts, and that upon these facts the legal presumption was that the cancellation was made by the testatrix *animo revocandi*, and that the burden of proving the contrary was upon the appellees. A word in explanation of this claim, as the appellants make it, may be called for. They do not assert that in every case, and at the outset, a burden rests upon the proponents of a will to prove not only the affirmative, that it was once valid, but also the negative, that it has not been afterwards revoked, either wholly or in part; to prove the case and anticipate and disprove the defense. This being so, they do not mean that a burden of proof is upon the appellants "in the first instance"—Knox's Appeal, 26 Conn. 20, 22—but only a burden "shifted," if such expression is ever proper, and it is sometimes used. Barber's Appeal, 63 Conn. 393, 403. The main facts upon which the appellants rely in support of this claim of a legal presumption in their favor, are these:—

"The will in question was drawn by Charles Miles, the executor, in 1879, at the time it bears date, and remained in his possession unchanged until the fall of 1885, when David Miles, a brother to the testatrix, and one of the residuary legatees, sent for the will, and in pursuance of his request Charles Miles sent said will to said David. Shortly after the will was so sent by Charles Miles to David Miles, the testatrix handed to David Miles an envelope upon the outside of which was written, 'Diana Miles' will,' and said to him, 'There is my will.' As she handed the will to David he said to her, 'Are you satisfied with it now?' and she replied, 'Yes.' It did not further appear in evidence how or when or for what purpose, the testatrix had received said will from David Miles after he had received it from Charles Miles, as aforesaid. From that time the will remained in the possession of said David Miles, until his death in December, 1885. A few days after the death of

David Miles, at the request of the testatrix, the will was delivered to Henry C. Miles, a brother of the testatrix, who from that time kept it in his possession until it was filed in the Court of Probate by said Henry C. Miles, in February, 1892. The erasures in question were made prior to delivery of the will to Henry C. Miles, after the death of David, aforesaid." They were not made prior to the time the will was sent by Charles Miles to David Miles, in 1885. "In the fall of 1881 said Henry C. Miles, who had procured a copy of said will, said to the testatrix, 'By your will you have given my brother Charles' family twenty-four shares of the New York & New Haven Railroad stock, and you have given brother David and myself eight.' The testatrix replied, 'I won't have it so: I will scratch it out.'" The court reciting these facts added: "From the appearance of said erasures and from all the facts aforesaid, I believe that said erasures, though made at the request of the testatrix, and for the purpose of revoking the provision of the will over which said lines were drawn, were not made by the testatrix herself."

We discover nothing in these facts which raises what may be called a legal presumption in favor of the appellants, if by that term was meant anything more than that such facts, or some of them, have a recognized and declared probative right, sufficient under some circumstances to establish a *prima facie* case. Concerning such presumptions, so called, there is in the books an infinite variety and contrariety of statement. But it is useless here to enter into a discussion of the matter, for upon the record before us we can see no reason to think the trial court failed to give to each item of evidence its full weight, whether naturally pertaining or arbitrarily attached to it by the law. It was the duty of the court to weigh all the evidence, and we cannot say that it did not do so, and correctly. In other words, if the appellants meant by their claim that facts found were sufficient as a matter of law to establish conclusively, irrefutably, the fact that the testatrix either herself made such erasures, or caused the same to be made in her presence, such claim is not correct, and no authority has been cited or exists anywhere to support such claim. But if it is only meant that such facts shift, satisfy or discharge a burden, casting it upon the other side, not to prove the contrary, but to disprove or

overcome that, not to establish a negative, but to overcome an affirmative, we cannot say, nor do we believe, that the court below considered or acted otherwise than with the same view.

It was further claimed by the appellees, as we have seen, that a portion of a will could not be revoked in the manner considered. If this be correct, it in itself furnishes a full justification of the decision of the court below. For the reasons already stated, we do not need to place our decision upon this ground; yet we ought not to pass it by without some reference and consideration. It would perhaps be too strict a construction of the statute referred to, if we held that under no circumstances could there exist a partial revocation of a will or codicil, effected by burning, canceling, tearing or obliteration; that such revocation must extend to the whole instrument and be operative to revoke the whole, or be without effect. Such a construction has indeed been given to very similar statutory provisions in several other jurisdictions. But probably the weight of authority upon the question is otherwise. The entire subject is most exhaustively and ably treated in a note to the case of *Graham v. Birch*, 28 Amer. St. Rep. 344. But on the other hand if we were to declare, following the language of the opinion often cited in *Bigelow v. Gillott*, 123 Mass. 102, that the authority to revoke an entire will included the lesser power to revoke any portion of it only, and to stop there, as the court in Massachusetts does, it seems to us that an inference might be drawn that would extend entirely too far. For, if such conclusion, looking at the statute in question alone, might be drawn, there is another statute appearing upon the same page of the General Statutes, namely, § 538, providing how wills must be executed. If a case arises which is simply and purely one of revocation, § 538 will not apply. But if such revocation involves alteration, it certainly must apply. The difference in meaning between the two terms is aptly stated by Mellish, L. J., in *Swinton v. Bailey*, 45 L. J. Ex. 427, where a testator by his will had devised his real estate to E, "her heirs and assigns forever." He subsequently obliterated these words with pen and ink. The judge said (p. 429): "The difference between revocation and alteration seems to me to be this: if what is done simply takes away what was given before or a part of what was given before, then it is revocation, but if it gives something

in addition, or gives something else, then it is more than revocation and cannot be done by mere obliteration." In *Eschbach v. Collins*, 51 Md. 478, is an able discussion of this matter. In that case the effect of erasures was to enlarge the estates of the devisees from life estates to fees. The court held such erasures inoperative under a statute which provided that a will, or any clause thereof, might be revoked by cancellation. The court said (p. 499): "The will has not been revoked; it has been altered. It cannot be supposed that when the legislature uses the word 'revocation,' it is to be construed to mean 'mutation.' * * * When by the obliteration of certain words a different meaning is imparted there is not a mere revocation. There is something more than the destruction of that which has been antecedently done. There is a transmutation by which a new clause is created. There is another and a distinct testamentary disposition which must be authenticated by the observance of the statutory requirements." The court gives as an illustration of how fully such a transmutation might be made by mere erasures, this example: Suppose the original words were, "To my son, William, I give nothing, and give all my estate to my son, John." The will with no addition could be made to read, "To my son, William, I give all my estate." This may seem an extreme illustration, but probably there are few wills made, of any considerable length, in which alterations in meaning, by mere erasure, could not be effected, as objectionable, if not as marked as this. Indeed, without holding that there are none, it seems to us that there are few cases that could arise where the revocation of a portion only of a will, would not operate to alter other portions of it. If an entire clause—meaning by that word one of those distinct and generally numbered subdivisions into which wills are frequently apated, or an entire unconnected provision making disposition of property—be erased or canceled, and what was thus disposed of becomes intestate, it may be said that there is a revocation, and nothing more.

The same thing has been affirmed by some courts where, instead of such intestacy, the property passes into a prescribed residuum. But this appears to us to be more questionable. The residuary devisee or legatee takes by virtue of the will, defeating the heir, and he takes by force of the alteration what

he did not take without it. The mischief seems the same. The distinction is more apparent than the difference. Take the very case before us: There were originally two clauses. One disposed of certain stock; the other of the balance of the estate. By revoking the first, there ceased to be any residue, unless the estate in its entirety can be so styled. But look at the object of the change. Was it revocation, or was it alteration? One of the brothers of the testatrix procured a copy of the will from another brother who had it in his possession. He was apparently curious until he knew its contents, and dissatisfied when he learned them. He said to his sister, "By your will you have given my brother Charles' family twenty-four shares of the New York & New Haven Railroad stock, and you have given my brother David and myself eight." She said, "I won't have it so; I will scratch it out." What was this interested brother's motive? To defeat his nieces of their legacies? Or was it rather to increase his own? What would the old lady "not have so"? That her nieces should be remembered, or that the families of those brothers should be treated unequally? It seems to us the answer is obvious, and that to all just intents and purposes here was not merely revocation but substitution; not destruction, but reconstruction; a "scratching out" indeed, but one equivalent to a writing in; the making of a new testamentary disposition, and in a manner not permitted by law—a law passed in the interest of public policy, the wisdom of which such a case as the present abundantly demonstrates.

There is no error.

In this opinion the other judges concurred.

What Constitutes Destruction?

In Re KISSAM'S WILL.

59 Misc. Rep. 307, 110 N. Y. Supp. 158. 1908.

MILLARD, S. The last will and testament of Harriet Kissam, executed and attested in manner prescribed by law, has been presented for probate. It is accompanied by an instrument in writing, duly acknowledged, executed by all the heirs

at law, and next of kin of decedent, waiving the issuing and service of citation, and consenting that will be admitted to probate. It appears by an examination of the will, which is typewritten, that a part of the second clause has been erased. The statute directs that the surrogate "before admitting a will to probate must inquire particularly into all the facts and circumstances, and must be satisfied of the genuineness of the will and the validity of its execution." Code Civ. Proc., § 2622; *Matter of Bartholick's Will*, 141 N. Y. 166, 172, 36 N. E. 1.

Inquiry into the facts and circumstances by examination of two credible witnesses, the scrivener, who also was one of the subscribing witnesses, and the testatrix's sister, to whom testatrix read the will after it was executed, clearly and distinctly established that, at the time of the execution and attestation of the will, the second clause thereof read, "Second, I give and bequeath, subject to said life estate, to Mrs. Lillian Roome and Miss May A. Husted, of Washington, D. C., each, the sum of five thousand (5,000) dollars"; and that thereafter the testatrix altered such second clause by erasing the words "and Miss May A. Husted" and the word "each."

The testatrix could not by such erasure alter her will. It is provided by 2 Rev. St. (1st Ed.) pt. 2, c. 6, tit. 1, § 42, that "No will in writing, nor any part thereof * * * shall be revoked or altered, otherwise than by some other will in writing, or some other writing of the testator, declaring such revocation or alteration, and executed with the same formalities with which the will itself was required by law to be executed." The effect of this statutory provision is to prevent a testator from altering his will, otherwise than by an instrument executed in the same manner as required to give it effect as a will. The statute has surrounded the execution of testamentary instruments with certain forms and ceremonies as a shield and protection against fraud and imposition, and the purpose of such precautionary measures might be entirely defeated, if held only to the original execution, leaving all subsequent alterations to be made without such protection. The aim of the statute is to close the door against opportunities of fraud and alterations in a will except by the observance of the same formalities as in its execution.

In *Lovell v. Quitman*, 88 N. Y. 377, 42 Am. Rep. 254, it

appears that after will was executed, the testatrix obliterated clauses numbered "2nd" and "4th" with intent to revoke the same. Held, that the obliteration was not effectual for that purpose, and that the will remained in full force and effect as before. In *Quinn v. Quinn*, 1 Thomp. & C. 437, after will was executed, the testator made alterations by erasing and interlining. Held, that the testator could not by an erasure partially revoke his will, and that will should be probated as originally written. In *Stevens v. Stevens*, 6 Dem. Sur. 262, 3 N. Y. Supp. 131, the testatrix, after the execution of her will, attempted to alter it by having a bequest written on a separate piece of paper and pasted on the will, cutting the latter in two for that purpose. Held that the attempted bequest was ineffectual, and that the original will was not rendered invalid. In *Matter of Carver's Estate*, 3 Misc. Rep. 567, 23 N. Y. Supp. 753, it was held that the effect of an unauthenticated erasure in a will made after execution is to render the change sought to be made, inoperative, leaving the will to stand in form and effect as before the alteration was attempted. In *Matter of Lan's Will*, 9 Misc. Rep. 521, 30 N. Y. Supp. 388, it was held that alterations and erasures made after the execution of a will will not invalidate it if the original intention of the testator can be ascertained. In *Matter of Prescott*, 4 Redf. Sur. 178, it was held that where a testator, after the execution of his will, makes erasures and interlineations therein, without intending to revoke the will, and without re-executing the same, the will must be admitted to probate as originally executed. In *Dyer v. Erving*, 2 Dem. Sur. 160, it was held that after one has signed and published an instrument, as and for his last will, though he may revoke it by destruction, or annul or modify it by another writing executed with due formalities, he cannot otherwise vary its terms by additions, interlineations, obliterations, or erasures on its face. In *Matter of Westbrook's Will*, 44 Misc. Rep. 339, 89 N. Y. Supp. 862, will after execution was altered by cutting out its first subdivision and fastening together the remaining parts; the piece cut out could not be found. The scrivener who was also one of the subscribing witnesses testified as to the missing clause, which the court held was sufficient proof of that portion and admitted will to probate as originally executed.

It being the duty of the surrogate to admit a will to probate as executed, and to disregard alterations made without formalities prescribed by statute, it necessarily follows that the Surrogate has power to take proof of the provisions of the instrument before alteration. A decree will be entered admitting will to probate as originally written and executed.

By Cancellation.

LADD'S WILL.

60 Wis. 187. 1884.

The case is thus stated by Mr. Justice Cassoday:—

“It appears from the record and, in fact, is admitted by all parties and, in effect, found by the court, that the will of the testatrix was duly made, executed, attested, witnessed, published, and declared as a will, July 29, 1870, in the State of New York, but in strict conformity with our Statutes, and that the will is entitled to probate, if not revoked; that the paper upon which the will was written was a very large, thick, double sheet, the first page of which was originally a printed blank form of a will, the blanks of which were filled up with the writing; that the written and printed parts constituting the will were wholly upon the first page, that nothing was written or printed upon the second or third page of the sheet,—they being entirely blank; that the usual indorsement by the scrivener was upon the fourth or outside page of the wrapper leaf, and upon which there was also written in pencil, in the handwriting of the testatrix, the words: ‘I revoke this will. Mary P. Ladd, October 7, 1879.’

“October 7, 1882, the testatrix died, in Grant county, Wisconsin, where she then, and for several years had had her residence and domicile. The testatrix retained the will until her death, when it was found in the bottom of her trunk, tied up with her decree of divorce, and covered with a newspaper. The Circuit Court, affirming the decision of the County Court, held that the will was revoked by the writing in pencil, and judgment was entered accordingly.”

CASSODAY, J. The frauds incident to allowing written wills to be set aside by parol testimony finally culminated more than two hundred years ago in the trial of the feigned issue in *Cole v. Mordaunt*, where it appeared at the bar of the King's Bench that most of the nine witnesses against the will were guilty of deliberate perjury, and the widow who sought to set aside the will was guilty of subornation of perjury. On a petition for a review of the case, Lord Chancellor Nottingham remarked that "he hoped to see one day a law that no written will should ever be revoked but by writing." See notes to *Mathews v. Warner*, 4 Ves. Jr. 196; *Prince v. Hazelton*, 20 Johns. 513. This remark and that trial led to the enactment of the Statute of 29 Chas. II., "for the prevention of frauds and perjuries," in the following year. 3 St. at Large, p. 385, ch. 3. In fact, the eminent father of equity himself introduced the bill, as he afterwards stated in *Ash v. Abdy*, 3 Swanst. 664; 4 Lives Ld., ch. 271.

Section 6 of that chapter prescribed the manner in which a "devise in writing of lands, tenements, or hereditaments," or "any clause thereof," might be revoked, and prohibited revocation in any other manner. Our Statute relates to personal property as well as real estate, and has some words transposed, and is slightly different in some other respects; but otherwise § 2290, R. S., is substantially the same as that of § 6. The Statute is imperative upon the court, and is to the effect that "no will, nor any part thereof, shall be revoked unless by (1) *burning*, (2) *tearing*, (3) *cancelling*, (4) *obliterating* the same, *with the intention of revoking it*, by the testator, * * * or by some other (5) *will* or (6) *codicil* in writing, executed as prescribed in this chapter, or (7) by some other *writing, signed, attested, and subscribed in the manner provided in this chapter for the execution of a will.*" § 2290, R. S.

Here are seven ways prescribed for revoking a will, and all other ways, except such as are implied by law, are expressly prohibited. Each of the first four is by doing a specified act to the will itself, with the intention of revoking it. Each of the last three must not only be in writing and signed, but also attested and subscribed in the presence of the testator by two or more competent witnesses. § 2282, R. S. It stands confessed that the writing in pencil was never attested or subscribed by

any witness, much less by two witnesses in the presence of the testatrix. This failure to execute in the manner prescribed by the Statute manifestly prevented the words written in pencil from going into effect as a written revocation.

It should be observed that the written and printed matter constituting the will was wholly on the first page of the double sheet. The second and third pages were entirely blank. The pencil writing was upon the fourth page,—the outside of the wrapper leaf. Nevertheless, it is urged, in effect, that it was upon the same sheet of paper upon which the will was written, though remote from the writing, and hence that it should be held to have been done to the will itself; and that since the act so done consisted in writing words disclosing an intent to revoke, it must be held to be a “cancellation” of the will, “with the intention of revoking it,” within the meaning of those words as used in the Statute. This, however, assumes that the second half-sheet of the paper, upon which no part of the will appears, constitutes a part of the will. If this is so, then a sheet of paper may be never so large, and yet if a will be written upon one corner, and words indicating an intention to revoke be written upon another corner, however distant from every part of the first writing, yet it would have the effect to cancel the will. Would this be a fair construction of the Statute? Would such a construction prevent “frauds and perjuries,” according to the original intention of those who enacted the Statute? Or would it be more in harmony with that intention to hold that the written and printed matter together, found on the first page of the double sheet of paper in question, constitutes the will of Mrs. Ladd? Of course, there could be no written or printed matter except upon some substance, and hence so much of the first half-sheet of paper was essential to the existence and preservation of such written and printed matter, may, in a sense, be regarded as a part of the will. But no part of the double sheet of paper, much less any portion of the first half-sheet upon which the will was written and printed, was in the least burned or torn. Nothing was done to any portion of the written or printed matter constituting the will. No part of it was obliterated. No part of it was erased or cancelled. No interlineation was made. All that constituted the will remained intact. Every part of it remained

as perfect as when it was first written. The same would have been true if the second half-sheet had been entirely severed from the first. The only question is, whether it was cancelled, within the intent of the Statute, by the mere force of the meaning of the word "revoke" contained in the pencil writing. As observed, the Statute requires, not only the act of cancelling the will itself, but that it must be done with the intention of revoking it. * * *

In *White v. Casten*, *supra*, the paper upon which the will was written was burned through in three places, one of them being in the midst of the writing, and a large part was scorched, but the writing was not interfered with, when it was rescued against the testator's wish, and preserved against his knowledge, and it was held to be a revocation. The mere act of burning, tearing, cancelling, or obliterating the will itself, without the intent, is not enough. * * * So the mere intention to revoke the will, unaccompanied by any act of burning, tearing, cancelling, or obliterating done to the will itself, is not enough.

* * * * *

Some courts have held that where the testator is deceived into the belief that he had done an act sufficient to revoke the will it shall have that effect. *Pryor v. Coggin*, 17 Ga. 444; *Smiley v. Gambill*, 2 Head, 164. The case in Head was put on the ground that there was no such Statute in Tennessee, and the case in Georgia fails to refer to any Statute or decision. On the other hand, several of the above cases hold that where the legatee has falsely deceived the testator into the belief that he has in fact revoked his will, he shall be held in equity to hold the property as trustee for the heir; but that there can be no revocation except in one of the modes prescribed by Statute. * * * The question, however, is not here involved, and is referred to merely because counsel seem to rely in part upon the Tennessee and Georgia cases.

Even if such intention to revoke be expressed in writing never so strongly, and signed by the testator, yet, if the writing was never in fact attested and subscribed by the requisite number of witnesses, in the presence of the testator, so as to become effectual as a revocation under the Statute, it cannot operate as a revocation, when unaccompanied by any of the four acts, done to the will itself, specified in the Statute. * * *

In *Kirke v. Kirke*, supra, the codicil was signed by the testator, who, among other things, in effect therein declared: "I do hereby revoke that part of my said will" which has been erased, and in lieu thereof substitute what has been interlined; but it was held, by an eminent judge in such matters, that, although there was a clear intent to alter the will as indicated, yet that, as the codicil had not been duly executed and attested so as to pass real estate, such intention was ineffectual, and the original will was held to be in force the same as though there had never been any alteration.

In *Locke v. James*, supra, the testator erased the word "six" wherever it occurred in his will, but leaving it still legible, and inserted over it the word "two," and thereupon added, presumably upon the same paper, the following memorandum or codicil to his will, signed by him in the presence of one witness only: "The alterations in the first and second sheet, all relating to the said annuities left to my daughter, E. J., and her children, were made by me, the 15th of August, 1830. Witness my hand. R. N.;"—and Parke, B., speaking for the court, said that the "rent charge of £600 per annum, created by the will, duly executed and attested, * * * has not been cancelled, for the erasure was made *sine animo cancellandi*," and that it "has not been affected by the codicil, for the codicil is not duly attested, and therefore cannot even be looked at, so far as the real estate is concerned."

In *Jackson v. Holloway*, supra, the testator, after having erased certain words and interlined others in place of them, and "at the same time indorsed on the will an instrument" to the effect that he had made the alterations named, and thereby renewed the will, which instrument was duly signed, sealed, and published by the testator in the presence of two persons, who also signed the same as witnesses in his presence. But because there were not three instead of two witnesses, as required by the Statute of New York, it was held that the erasures, interlineations, and the written indorsement so executed and witnessed, had no effect whatever upon the original will.

In *Lewis v. Lewis*, supra, the word "obsolete" was written by the testator upon the margin of his will, but it was held to be of no significance.

In *Laughton v. Atkins*, supra, it was strongly intimated, if

not held, that the written instrument containing words of revocation must itself be admitted to probate to have that effect.

In *Cheese v. Lovejoy*, *supra*, the testator had drawn his pen through the lines of various parts of his will, and then wrote on the back of it, "All these are revoked," and threw it among waste papers; but it was preserved, and it was held that there was no revocation, because the words "or otherwise destroying," in the present English Statute, were not satisfied. But that Statute does not contain the words "cancelling or obliterating," like ours, and ours does not contain the word "destroying," like theirs; and hence the case is distinguishable. But in the more recent case of *Swinton v. Bailey*, *supra*, the will was made prior to the Statute of Victoria, and the case was decided under the old Statute like ours, and it was held by the House of Lords that the words "her heirs and assigns forever," through which the testator had drawn his pen, had been obliterated, within the meaning of that word as used in the Statute of Frauds.

Counsel for the respondent insist that the revocation here was complete within the rule followed in *Evans's Appeal*, 58 Pa. St. 238. In that case the will was executed May 24, 1856, and the last clause of it spoke of two erasures and interlineations in their places. At the same time, and immediately beneath the signature of the testator, was a codicil, also signed by the testator, making two changes in the will. They followed the attesting clause and the signature of the witnesses. On or about July 21, 1858, the testator tore through three different clauses of the will, and made three erasures, one of which was so obliterated as to be illegible; and then made a second codicil, explaining such alterations and revocations. This second codicil was duly signed and published by the testator, in the presence of the requisite witnesses, who subscribed the same. Subsequently the testator tore the first codicil in two places, erased his signature thereto, and also erased his signature to the second codicil, and wrote beneath it the word "cancelled." The will and codicils were all upon the same sheet of paper. This paper was indorsed "Will," which was erased, and the word "cancelled" written beneath it. Independent of the writing of the word "cancelled" there can be no doubt but what the tearing of the first codicil, which was executed at the same time and was in fact a part of the original will, and the erasure by the testa-

tor of his signature thereto, and also the erasure by him of his signature to the second codicil, was a complete revocation of the will. * * * The case of *Woodfill v. Patton*, 76 Ind. 375, cited by counsel, was under a different Statute, and hence is not applicable. The same is true of the recent case of *Lovell v. Quitman*, 88 N. Y. 377. See *Gay v. Gay*, 60 Iowa, 415, which was also under a different Statute.

The learned judge writing the opinion in *Evans's Appeal* was clearly right in saying: "But to enable the will, codicil, or other writing to have such an effect (revocation), it must itself be complete, executed, and proved in the prescribed manner, namely, as a will. The other mode of repeal is something done to the will itself, something more than mere intention expressed. It must be intention to annul carried into execution by acts done to the paper. * * * Were there nothing more than the erasure of the last signature to the writing dated May 24, 1856, it would be difficult to escape from the conviction that it was an act of repeal annulling all that preceded that signature." In view of the additional facts which appeared, that the testator also tore the first codicil in two places and erased his signature from the second codicil, it would be impossible to come to any other conclusion than that he intended, by the acts named, to revoke both of the codicils and the whole will. These several acts being made with the intent to revoke, as there found, clearly amounted to a cancellation of the will; but when the learned judge went further, and construed the word "cancelled," written thereon, and said, "I think a repeal (a revocation of the will) is effected by the act of writing upon the will itself a word that manifests an intention to annul it," he was evidently speaking for himself, and not for the court, and as it would seem in direct violation of the rule he had just expressed himself, to the effect that there could be no revocation by mere "writing" unless it "be complete, executed, and proved in the prescribed manner, namely, as a will." Besides, such a rule would be in conflict with a previous decision in the same court. *Lewis v. Lewis*, *supra*. True, the learned judge attempts to distinguish that case by observing "that though the word was written upon the paper on which the will was written, it was placed where it could have been detached without defacing the instrument. It might have been separated and the will

itself remained intact. In this respect it differed from the case now before us." That distinguishing element, even if it were sound, would distinguish Evans's Appeal from the case before us, and make *Lewis v. Lewis* applicable. The learned judge who wrote that opinion was evidently led to say what he did by what was said by the judge writing the opinion in *Warner v. Warner's Estate*, 37 Vt. 356, where the testator wrote on the back of the very paper on which a part of the will was written, and on the second page, and just below some of the writing, so that it could not be separated from it, the words "This will is hereby cancelled and annulled in full, this 15th day of March, in the year 1859." Other words were written on the fourth page, and some erased, but the court held, in effect, that the will was cancelled by force of the above words. If that ruling were sound, the facts would distinguish the case from this; but giving the force of revocation to the words themselves, without being executed, attested, and subscribed as required by the Statute and without any tearing or burning of the paper upon which any part of the will was written, and without erasing, defacing, or obliterating any of the words of the will, or the signature of the testator or the signature of the witnesses, would seem to leave the case standing alone, with nothing to support it, and in opposition to the principles maintained in some to the best adjudicated cases. Besides, the case is condemned by one of our ablest text writers on the subject. 1 Redf. on Wills (4th ed.), 318. The difficulty with the rule contended for is that it gives to the words written in pencil, although not attested, witnessed, nor executed in the manner prescribed by the Statute, the same force as though they had been so attested, witnessed, and executed, for the purpose of proving that the act of putting the words there was with the "intention" of revoking the will. It is the language—the expression by written words alone—which is thus sought to be made effectual; whereas the Statute in effect declares that such written words shall have no force or effect as such unless executed, attested, and subscribed as required.

The argument used by the writer of the opinion in Evans's Appeal, *supra*, and here repeated, to the effect that the word "cancelling" in the Statute is used in the same sense as cancelling notes, bonds, or other written instruments, is plausible,

but fallacious. It is the payment, adjustment, settlement, or decree of the court which precedes the writing of the word "cancel" upon the instrument, that effects the cancellation. The word is written in such case merely as a memorandum or evidence of the previous facts which operate as a nullification. Besides, such writing is generally upon the face of the instrument itself, and not upon some remote corner of the same sheet. A will, unlike other written instruments, does not go into effect until the testator's death. The mode of making a will is definitely prescribed by Statute, and the mode of revoking a will is also definitely prescribed; and no essential part of the latter can be dispensed with any more than the former. So, a specific mode of cancellation of tax certificates, &c., fixed by Statute, furnishes no ground for holding that a will, though not included in such Statutes, may also be cancelled in the same way. Our Statute as to the mode of revoking wills came to us with its history, and the constructions which had been put upon it by the courts. In so taking it, the people of the State knew what they had obtained. To change that construction by some artificial mode of reasoning is to open the door to vagueness and uncertainty, the disastrous effects of which no one can in advance determine.

But it is claimed that such intention to revoke is sufficiently proved, without resorting to the words in pencil, by the declarations of the testatrix. It is not claimed, and there is no evidence tending to show, that any of such declarations were made at the time the words in pencil were written, but on other and different occasions. Such declarations are clearly inadmissible, because they do not constitute a part of the *res gestae*; besides, to allow them to have the force of evidence would be admitting testimony of one unsworn, and without the privilege of cross-examination. * * * The admission of such declarations to rebut the inference of fact arising from the absence or loss of a will is upon a different theory, as will appear from the well-written and able opinion of Judge Dyer in *Southworth v. Adams*, 11 Biss. 256. It has been held that where the intention to revoke had existed and been partly carried into execution, and the testator changed his mind and arrested the act of burning, tearing, cancelling, or obliterating the will before its completion, leaving the will so that its contents could still be

read, that it might nevertheless be admitted to probate. *Doe v. Perkes*, 3 Barn. & Ald. 489; *Doe v. Harris*, 6 Ad. & El. 209; *Giles v. Warren*, 3 Eng. (Moak), 478.

So, where there has been an attempt to alter certain portions of the will by erasure, without obliteration, and by substituting new words in their place by way of interlineation, and the writing thus altered failed to go into effect for want of re-attestation, courts have held that there was no intent to revoke, except by way of alteration, which having failed, the will remained intact as before. * * *

But without further discussion, which is already too extended, the judgment of the Circuit Court is reversed, and the cause is remanded with direction to reverse the judgment of the County Court and to direct judgment admitting the will to probate.

Ordered accordingly.

Dependent Relative Revocation.

In Re KNAPEN'S WILL.

75 Vt. 146, 53 Atl. 1003, 98 Am. St. Rep. 808. 1903.

STAFFORD, J. The testatrix made and executed her will in due form of law, and the same is still decipherable. But afterwards she attempted to make various changes therein without complying or attempting to comply with the requirements of the statute; and the question is threefold—whether the will is to be established as it was when it was executed, disregarding the attempted changes; or to be disallowed as having been wholly revoked thereby; or to be established as originally executed, except as to certain clauses, and as to those to be treated as revoked by cancellation.

The will, as executed, made some special bequests, and several money bequests, and then added a residuary clause in favor of the testatrix's two sisters, Susan Tupper and Margaret Vaux. In this clause a pen and ink line has been drawn through the name "Margaret Vaux." In the margin opposite has been written in ink the word "deceased"; and at the end of the clause have been added, also in ink, the words, "Share with Mrs. Ada Stabb." The original will was typewritten, and all the at-

tempted changes made with a pen, are, it is agreed, in the handwriting of the testatrix.

In one of the early clauses there was a bequest to the same Margaret Vaux of five hundred dollars. Here the name "Margaret" has been drawn through with a line in ink, and the word "deceased" written in the margin opposite; and to the clause have been added the words, "to be given to Mrs. Ada Vaux Stabb."

The next clause originally read as follows: "I give and bequeath to the two daughters of my said sister Margaret Vaux, Bessie and Ada, each the sum of three hundred dollars. I also give to the said Bessie and Ada, each, one-half dozen silver teaspoons. I also give to the said Ada Vaux my gold watch." The changes made are these: The name "Bessie" has been drawn through with an ink line where it first occurs and marked over with a pencil in the other place. The word "watch" has been marked over with a pencil. To the clause have been added in ink the words, "To be given to Mrs. Ada Vaux Stabb;" and these words have been marked over with a pencil.

In the next clause but one, a bequest of two hundred dollars has been changed by writing in ink the word "four" over the word "two" and by writing in the margin the word "four" and the figures "400." In the next clause the name of the legatee and the words designating the amount have been drawn through with an ink line. Other similar changes have been made. New bequests have been written in the margins, and one of these has been marked over with a pencil.

First, then, do the attempted changes constitute a revocation of the will? V. S. 2354, following the English Statute of Frauds, declares: "No will shall be revoked, except by implication of law, otherwise than by some will, codicil, or other writing, executed as provided in case of wills; or by burning, tearing, cancelling or obliterating the same, with the intention of revoking it, by the testator himself, or by some other person in his presence and by his express direction." Do the alterations amount to a revocation of the will by cancellation?

The agreed statement of facts does not say that the alterations were made with the intention of revoking the will, and, judging from the alterations themselves, there was no intention to revoke the will as a whole, but, on the contrary, an intention

to have it stand with certain changes. There is no interference with the formal parts, and no intention to revoke the whole is anywhere expressed. In these important respects the case differs from *Warner v. Warner's Estate*, 37 Vt. 356, 367, where the testator had written across one page of the instrument, "This will is hereby cancelled and annulled," and under the filing on the outside, "Cancelled and is null and void. I, Warner," and had erased the words, "In testimony whereof I have." We think the attempted changes in the present case cannot be said, as matter of law, to amount to a revocation of the whole will by cancellation, for although they would, if effectual, make of it a very different instrument, yet it cannot be said therefrom that the testatrix would not have left the instrument as it was in the first place, rather than have died intestate.

The interlineations of new and independent bequests are, of course, ineffectual. Neither do they invalidate the will, which was properly executed in its original form. *Wheeler v. Bent*, 7 Pick. (Mass.) 61; *Jackson v. Holloway*, 7 Johns. (N. Y.) 394.

Do any of the attempted cancellations of separate clauses constitute a revocation of the will to that extent? If we admit that in some circumstances there may be a partial revocation, we have to take note of certain complications in the present case. This will contains a residuary clause, and every cancellation of a money legacy, and probably, as this will is written, every cancellation of a specific legacy as well, works a corresponding increase in the residuary clause. *Bigelow v. Gillott*, 123 Mass. 102, 25 Am. Rep. 32. If there had been no residuary clause, the cancellation of a legacy would merely have left that part of the estate to be distributed as if no will had been made, and the rest of the will would operate as before; but here the cancellation gives the residuary clause a different operation. This has been held to prevent the attempted cancellation from operating as a partial revocation. *Miles' Appeal*, 68 Conn. 237, 36 Atl. 39, 36 L. R. A. 176.

But if we should hold otherwise upon this point, as was done in *Bigelow v. Gillott*, 123 Mass. 102, 25 Am. Rep. 32, we must notice a further difficulty. The testatrix has attempted to substitute a new residuary legatee in place of her deceased sister, Margaret; thus coupling the cancellation of previous bequests,

and the consequent enlargement of the residuary bequest, with the substitution of a new residuary legatee; so that it is impossible to say that she would have desired to make any of the cancellations if she had not supposed that the new residuary legatee would receive the benefit arising therefrom. In short, the alterations, when taken together, rebut the presumption of an intention to cancel any clause by itself and independently of other attempted changes and additions which are ineffectual for want of formality.

An act which might otherwise amount to a cancellation of an entire will has been held not to work that result because accompanied by other acts showing that the intention to cancel was conditional, and not absolute, as where the testator wrote upon the will the word "Cancelled," but further wrote that he intended making another will, "whereupon I shall destroy this." *In re Brewster*, 6 Jur. (N. S.) 56, 29 L. J. P. & D. 69; Woerner's Am. Law of Administration, § 48, with citations. So, likewise, where the testator includes an express clause of revocation in a later will, which fails to take effect through some defect therein, but not where it fails through some cause *dehors* the instrument. *Hairston v. Hairston*, 30 Miss. 276.

Jarman on Wills, vol. 1, p. 294, states the rule thus: "Where the act of cancellation or destruction is connected with the making of another will so as fairly to raise the inference that the testator meant the revocation of the old to depend upon the efficacy of the new disposition, such will be the legal effect of the transaction; and therefore if the will intended to be substituted is inoperative from defect of attestation, or any other cause, the revocation fails, also, and the original will remains in force." The words "or any other cause" may give the rule too much breadth, but they may be omitted without impairing the rule for our purpose. Similarly it is said with respect to partial obliterations or cancellations that if they are made with the intention of substituting other words for those cancelled, and such intention is frustrated, there is no revocation. Woerner's Am. Law of Administration, Sec. 49; Jarman on Wills, vol. 1, p. 295, with the cases cited by both authors.

As before remarked, the agreed statement upon which this case is tried, while it says that the alterations are all in the testatrix's handwriting, does not say with what intention they

were made. Consequently we can assume only such intention as the acts necessarily imply. The intention to revoke is indispensable to a revocation, whatever the act may be; and here the acts, taken together, certainly do not imply an intention to revoke absolutely and unconditionally, but only to do so in connection with and dependently upon the making of certain other changes. The intention expressed in such further alterations and additions having been frustrated by failure to comply with the statute, it must be held that there was no revocation. The result is that all the attempted changes, being readily distinguishable and agreed upon, go for nothing; and the will must be established as it was originally executed.

Judgment reversed and cause remanded.

Revocation by Circumstances—Married Women.

DURFEE v. RISCH.

142 Mich. 504, 105 N. W. 1114, 5 L. R. A. (N. S.) 1084. 1905.

MONTGOMERY, J. On appeal from the probate court, the circuit judge directed a verdict admitting the will in question to probate. Contestant appeals.

Testatrix, while unmarried, executed the will in question. She subsequently married, and had issue, one child, who survives. The sole question is whether the will of a single woman is revoked by her subsequent marriage, followed by the birth of a child or children. Our statute of wills (section 9270, Comp. Laws), which prescribes the formalities required for the revocation of wills, provides that "nothing contained in this section shall prevent the revocation implied by law from subsequent changes in the condition or circumstances of the testator."

There is no doubt that at the common law the marriage of a male testator, followed by birth of issue, operated to revoke a will. This revocation was implied from the changed relations and obligations of the testator, and was based upon the presumption that had the same conditions and obligations existed at the time of the execution of the will and been taken into account, a different will (if any) would have been made. Page on Wills, Sec. 282; Woerner's Am. Law of Administration (2d

Ed.), Sec. 54. It is difficult to suggest any reason why the same implication of a revocation should not arise in case of a female testatrix. The presumption that, had the same conditions existed at the time of the execution of the will as existed later, the disposition of the estate would have been different, is certainly as strong in the case of a wife and mother as in case of a husband and father.

The proponent argues that the rule as to the revocation of the will of a female was, at the common law, that her subsequent marriage alone revoked the will; that since by statute a married woman may now make a valid will, and since it is generally held that the effect of this statute is to abrogate the rule that marriage alone (in the case of a woman) revokes the rule, it follows that there is left no common-law rule upon which a revocation of a will by a female can be predicated. This is ingenious, but not convincing. It is true that the weight of authority sustains the view that, where statutes like our Married Woman's Act (section 8690) exist, marriage of a female does not of itself operate to revoke the will. * * *

The common-law rule as to the implied revocation resulting from marriage of the testatrix rested upon the ground that, after marriage, she could not make a new will, and as a will is ambulatory during the life of the testator, the continuing purpose to continue the will previously made in force could not be presumed from mere inaction on the part of one who, because of disability, could not act. Where, as in this state, the reason for this rule fails, the rule fails. It does not follow, however, because the marriage alone does not revoke the will, that marriage and birth of issue do not. The abrogation of this rule places the male and the female on the same plane as to this; i. e., that the subsequent marriage does not of itself revoke the will, but it is illogical to say, because the existence of a more restricted rule to the wills of females prevented the application of the general rule of the common law, that such rule should not be applied to make the female alike, when the removal of the latter's disability makes the general rule applicable.

As was said of a similar question in *Lansing v. Haynes*, 95 Mich. 16, 54 N. W. 699, 35 Am. St. Rep. 545, the common law is not so unbending as to lead to this result. "The reason of the law is the essence and soul of the law." In *Noyes v. South-*

worth, *supra*, it was said: "Our Constitution has done away with all disabilities of coverture, and expressly authorized every married woman to make wills of her estate as if she were sole. This leaves her case to be governed by the same rule which would apply to anyone else on change of condition. * * * There is no sound reason that we can perceive why, in the absence of statute, implied revocations should be extended, or should be differently treated as between men and women, when the property rights of married women have ceased to be hampered by marriage.

But it is further insisted that, as section 9285 makes provision for a child born after the making of his father's will, the rule that marriage and birth of a child revokes a will previously made by the father is abrogated. It is contended that this provision applies only to a man's will, and it was so held in *Cotheal v. Cotheal*, 40 N. Y. 405; but it is at the same time urged that, inasmuch as the rule as applied to a woman's will is applied by analogy, it follows that if the statutes have abrogated the rule as to men it follows that the rule as to women has no existence. This contention does not take account of the fact that we are to apply a principle of the common law, and that principle is not affected by the withdrawal of a class of persons from those to be affected by its operation. We regard this principle of the common law as controlling, and hold that the marriage of the testatrix and subsequent birth of a child to her resulted in a revocation by operation of law.

The judgment is reversed, and a new trial ordered.

CHAPTER IX.

REPUBLICATION AND REVIVAL.

Revival.

STETSON v. STETSON.

200 Ill. 601-607. 1903.

MAGRUDER, C. J., delivered the opinion of the court:

In the case at bar, Jesse Stetson died testate on April 27, 1899, leaving a will, dated December 3, 1897, and executed by him on that day in accordance with the statutes in such cases made and provided. This will was found after his death uncancelled and among his papers in the Citizens' National Bank of Princeton in Bureau county, with which bank the deceased was in the habit of doing business in his lifetime. The will, when found in the bank, was in an envelope, which was sealed. After the death of the testator it was taken by the president of the bank to the judge of the county court, where the envelope was opened, and the will was filed. It was duly admitted to probate on June 5, 1899; and the present bill in chancery to set aside the probate thereof was filed May 2, 1901, about a month before the expiration of the two years, allowed by the statute for filing a bill in chancery to contest the validity of the same.

The sole ground, upon which the validity of the will of December 3, 1897, duly admitted to probate, is contested, is that a subsequent will was executed by the testator, containing a clause revoking all former wills. Such subsequent will, alleged to have been executed between September 1, 1898, and the death of the testator, has been lost or destroyed; or, at any rate, it was not found in the possession of the testator, and has never been produced, either for probate in the county court, or otherwise.

The question, presented for our consideration, and raised by the refusal of the court below to hold as law the propositions submitted by the appellants, and by the rulings of the court below in the admission and exclusion of evidence, is two-

fold in its character, and, as formulated in the briefs of counsel on both sides, may be thus stated: If the second will, made by Jesse Stetson, contained an express clause of revocation, did such clause operate at once and of its own force to immediately revoke and annul the first will, made on December 3, 1897; and did the loss or destruction of the second will, containing such clause of revocation, even though such loss or destruction was the act of the testator himself, operate to revive the former will dated December 3, 1897?

Perhaps, in no branch of the law is there more conflict among the decisions of the courts than in that, which relates to the revocation of a former will by a subsequent will, and to the effect of the cancellation of a subsequent revoking will in reference to the revival or non-revival thereby of the first will.

There are cases, which hold, and many of the text books endorse and sustain the holdings of such cases, that, where a person, having made a will, afterwards makes another will, containing a clause expressly revoking all former wills, and afterwards destroys the second will, and dies, leaving the former will uncanceled, the revoking clause operates instantaneously to effect a revocation, and that, consequently, the destruction of the second will not revive the former one. * * * Many of the cases, which thus hold that the loss or destruction by the testator himself of a subsequent will, containing a revoking clause, does not revive a former will, though found in the possession of the testator uncanceled at his death, are based upon statutes dissimilar to the Illinois statute upon this subject, and upon the considerations which have no force or application in this State, and under our decisions.

In England, what is known as the Statute of Victoria, passed in 1837, provided (chap. 26, sec. 22), that "no will or codicil or any part thereof, which shall be in any manner revoked, shall be revived otherwise than by the re-execution thereof, or by a codicil executed in manner hereinbefore required, and showing an intention to revive the same," etc. (29 Am. & Eng. Ency. of Law, p. 289, note 2). Some thirteen of the American States have adopted either the Statute of Victoria, or a similar statute, upon this subject. But no such statute was ever passed or adopted in this State.

In some of the cases a distinction is drawn between a subse-

quent will, whose provisions are inconsistent with the former will, thereby operating to effect a revocation by implication, and a subsequent will, which contains a clause expressly revoking all former wills. This distinction, however, is done away with under the terms of the Illinois statute. Section 17 of the Illinois Statute of Wills provides as follows: "No will, testament or codicil shall be revoked, otherwise than by burning, canceling, tearing or obliterating the same, by the testator himself, or in his presence, by his direction and consent, or by some other will, testament or codicil in writing, in the presence of two or more witnesses, and by them attested in his or her presence; and no words spoken shall revoke or annul any will, testament or codicil in writing, executed as aforesaid, in due form of law." 3 Starr & Curt. Ann. Stat., 2d ed., pp. 4044, 4045. By the terms of this statute, the subsequent will, which shall have the effect of revoking a former will, must be a will "declaring the same"; that is to say, must be a will, which, upon its face and by its terms, declares a revocation. If the will must expressly contain a clause revoking all former wills, the question as to any inconsistency between the provisions of the later will and the former will is immaterial.

Again, many of the cases are based upon statutes, which authorize the revocation of a will to be made by a subsequent writing, which is not necessarily a will, or testamentary in its character. A large part of the American legislation upon this subject has its basis in the English Statute of Frauds, by one of the provisions of which, "no devise in writing of lands, tenements or hereditaments, nor any clause thereof, shall be revocable otherwise than by some other will or codicil in writing, or other writing declaring the same," etc. 1 Underhill on Wills, sec. 247. It will be noticed that, by the terms of this statute, a devise in writing of lands, etc., may be revoked, not only by some other will or codicil in writing, but by some "other writing declaring the same." In other words, the writing, declaring the revocation, may be some other writing than a will or codicil. Where the instrument of revocation is not necessarily, by the terms of the statute, a will, it may have the effect of operating instantaneously, so as to effect a revocation before the death of the testator; and if the instrument of revocation may be in writing, it will make no difference that its terms are

embodied in a will rather than in some other writing, which is not a will.

For example, one of the cases, relied upon by counsel for appellants to support their contention upon this subject, is the case of *In re Cunningham*, 38 Minn. 169, where the court say: "The testator might effectually revoke his former will by a writing so declaring, and executed as this instrument was executed, Gen. Stat. 1878, chap. 47, sec. 9, as he might also by other means." By reference to section 9 of chapter 47 of the General Statutes of Minnesota of 1878, it is found that a will may be revoked "by some will, codicil or other writing signed, attested and subscribed in the manner provided for the execution of a will." By section 17, however, of the Illinois Statute of Wills, the revocation must be by a will declaring such revocation, and not by some other writing than a will, which may not be testamentary in its character.

So, also, in *Cheever v. North*, 106 Mich. 393, it appears that, by the terms of the Michigan statute, a former will may be revoked not only by a subsequent will, but "by some other writing signed, attested and subscribed in the manner provided in this chapter for the execution of a will." The case of *Scott v. Fink*, 45 Mich. 241, is based largely upon the case of *James v. Marvin*, 3 Conn. 576; but the latter case of *James v. Marvin* has been materially weakened, if not actually overruled, by the subsequent case of *Peck's Appeal from Probate*, 50 Conn. 562. In *Peck's Appeal from Probate*, supra, the criticism of *James v. Martin*, supra, made by Redfield in his work on Wills, is referred to and quoted; and, there, the Supreme Court of Connecticut say: "The weight of authority seems to be in harmony with the views expressed by Mr. Redfield. * * * The testatrix by executing the second will evinced no intention to become intestate, but rather a contrary intention. By destroying the last will and carefully preserving the first she affords satisfactory evidence that she intended until the very last to die testate, and that that should be her will. In the absence of an express provision to that effect we cannot presume that the legislature intended that the mere execution of a will should in all cases revoke a prior will. Such a construction would in many cases defeat the manifest intention of the testator. The statute requires a 'later will or codicil.' We think that means

an operative will or codicil. * * * We would say, however, that we have carefully examined the cases cited by the counsel for the appellees, and find that many of them are cases in which the later wills became operative as wills; and of course the language of the courts must be interpreted with reference to that circumstance, and cannot properly be applied to a case like this."

So, also, in the case of *Barksdale v. Hopkins*, 23 Ga. 340, it appears that under the statute of Georgia a will may be revoked "by some other will or codicil in writing, or other writing of the deviser signed in the presence of three or four witnesses declaring the same." Under the Georgia statute, not only may the revocation be by an instrument not testamentary in its character, but Georgia is one of the States which has adopted the Victoria statute, or a statute similar to the Victoria statute above quoted. In Virginia, also, section 22 of the Statute of Victoria, 1837, is in force. *Rudisill's Exr. v. Rodes*, 29 Gratt. 148. In Texas, also, where the doctrine seems to prevail that the destruction of a duly executed will, containing an express revocation of a former will, does not have the effect of reviving the former will, the statute provides that a will may be revoked "by subsequent will, codicil, or declaration in writing executed with like formalities," etc. *Hawes v. Nicholas*, 72 Tex. 483.

It being established then that, under section 17 of the Illinois Statute of Wills, a former will can only be revoked by a subsequent will declaring the revocation of all former wills, and not by a subsequent instrument in writing not testamentary in character which declared the revocation of the former will, it cannot be said that, in this State, the destruction of a duly executed will, containing an express revocation of a former will, does not have the effect of reviving the former will.

We have held that "a will takes effect at the death of the testator." *Scofield v. Olcott*, 120 Ill. 362. Indeed, the general doctrine is, that a will is ambulatory, and has no effect until the death of the testator. It follows, that a testamentary paper, which the testator permits to survive him, must be his will. A will is inoperative and ineffectual, and has no legal existence, until it is consummated by death. *Taylor v. Taylor*, 2 N. & M. (S. C.) 483.

In *Marsh v. Marsh*, 3 Jones' L. (48 N. C. 78) it is well said: "As wills are ambulatory and have no operation until the death of the testator, it is difficult to see how the execution of a second will, which is afterwards destroyed by the testator, can in anywise affect the validity of the will previously executed. Both are inactive during the life of the testator, and the cancellation of the second, it would seem, must necessarily leave the first to go into operation at the testator's death. Nor is it perceived how the fact, that the second contained a clause of revocation, can alter the case; because that clause is just as inactive and inoperative as the rest of it, and so continues up to the time that the whole is canceled. This principle is settled in the common law courts in England, in regard to devises." In *Taylor v. Pegram*, 151 Ill. 106, we said: "As a general rule, if a will is traced into the testator's possession, and, at his death, cannot be found, the presumption is, (in the absence of circumstances tending to show a contrary conclusion,) that he destroyed it *animo revocandi*." "Where a testator has a will in his own custody, and that will cannot be found after his death, the presumption is that he has destroyed it himself—it cannot be presumed that the destruction has taken place by any other person without his knowledge or authority, for that would be presuming a crime." *Rickards v. Mumford*, 2 Ph. 24; 29 Am. & Eng. Ency. of Law, p. 292, note 3. See also *Boyle v. Boyle*, 158 Ill. 228. In *Boyle v. Boyle*, *supra*, it was held that a will will be presumed to have been destroyed by the testator himself, or at his direction, where he took it from the custodian with whom it had been for several months, and carried it away, and it could not be found after his death.

In the case at bar, the will, which is said to have been executed by Jesse Stetson between September 1, 1898, and his death on April 27, 1899, is shown by the testimony of the appellants to have been taken possession of by him as soon as it was executed, and to have been carried away by him from the office of the attorney, who is said to have drawn it; nor could it be found among his papers or elsewhere after his death. It is to be presumed, therefore, that Jesse Stetson destroyed this will *animo revocandi*. If he destroyed it with the intention of canceling or revoking it, it was canceled or revoked as an entirety; so long as Jesse Stetson was alive, this second will was

merely ambulatory, and had no operation, and could have no operation until his death. While it was thus ambulatory, and before his death, the presumption is that he destroyed it, and if he destroyed it, the clause contained in it, which revoked all former wills, was canceled and revoked, as well as the balance of the will. It necessarily results that the former will of December 3, 1897, was revived when the subsequent will, containing the revoking clause, was canceled or destroyed. Upon this subject Redfield in his work on Wills (1 Redfield on the Law of Wills, marg. p. 328) says: "It has been held in some of the American courts, that a subsequent will containing a clause of revocation, executed with due solemnity for the purpose of revoking an existing will, operates, *proprio vigore*, and instantaneously, as a revocation, and consequently, that the destruction of the second will did not revive the former one. This doctrine has an air of plausibility, from the fact that an instrument of revocation alone would unquestionably have this effect, so long as it was allowed to remain operative. But that would show a present purpose of becoming intestate, carried into effect as far as practicable before death. But the making of a will, with a revocatory clause, is very different. It is but substituting one will for another. And the revocatory clause is made dependent, in some sense, upon the subsequent will going into operation. And there is, ordinarily, no purpose of having the revocatory clause operate, except upon that condition. The whole instrument is, therefore, ambulatory, and when destroyed it all ceases to have any operation. And the same is true of the destruction of a will merely revocatory of former wills. By such destruction, the former wills, if in existence, become revived." Peck's Appeal from Probate, 50 Conn. 566.

In *Flintham v. Bradford*, 10 Pa. St. 90, the Supreme Court of Pennsylvania say: "All wills are in their nature inchoate and ambulatory until testator's death, at which time, and not before, the testament becomes operative and complete. The will of 1824 was an inchoate intention, mutable and inconstant, and, by the willful and deliberate act of cancellation on the part of the testator, it became as if it never had been. The prior will of 1821, being preserved by the testator entire, and without intentional or apparent blemish, became the will for the time being, which should be consummated at the testator's

death, unless before that time he manifested a change of intention, according to the rules of law." So, in the case at bar, the second will, alleged to have been made by Jesse Stetson, was inchoate and ambulatory until his death; and, as he is presumed to have destroyed it for the reasons already stated, "it became as if it never had been." The prior will of December 3, 1897, having been preserved by him entire and without intentional or apparent blemish, has become his will.

At common law, where the later of two inconsistent wills was revoked by the testator in his lifetime, the earlier will became thereby revived, "and, unless afterwards revoked by some subsequent act, came into operation on his decease, whether the later will contained an express clause of revocation or not." 29 Am. & Eng. Ency. of Law, p. 288. In *Harwood v. Goodright*, Cowp. 92, Lord Mansfield said: "If a testator makes one will and does not destroy it, though he makes another at any time virtually or expressly revoking the former, if he afterwards destroy the revocation, the first will is still in force and good." 29 Am. & Eng. Ency. of Law, p. 289, note 3.

In *Goodright v. Glazier*, 4 Burr, 2513, Lord Mansfield said: "Here, the intention of the testator is plain and clear. A will is ambulatory till the death of the testator. If the testator lets it stand till he dies, it is his will; if he does not suffer it to do so, it is not his will. Here, he had two. He has canceled the second; it has no effect, no operation; it is as no will at all, being canceled before his death. But the former, which was never canceled, stands as his will." In the same case Mr. Justice Yates concurred with Lord Mansfield and said: "A will has no operation till the death of the testator. This second will never operated; it was only intentional. The testator changed his intention; and canceled it. If by making the second the testator intended to revoke the former, yet that revocation was itself revocable; and he has revoked it."

In *Schouler on Wills* (3d ed., sec. 413) it is said: "The English common law tribunals laid down a rule, under Lord Mansfield's lead, which has been thought more inflexible than that favored by ecclesiastical courts, viz., to the effect, that, if a testator keeps his first will undestroyed and uncanceled, makes a second will virtually or expressly revoking it, and then destroys or cancels the second will only, thus repealing his revo-

cation, the first will thereupon revives and continues in force.” “In the ecclesiastical courts it was held that the revocation of the later will raised no presumption in favor of the revival of the earlier will, but that the question depended upon the intention of the testator, as shown by the peculiar facts and circumstances of the case, and was open to decision either way.” 29 Am. & Eng. Ency. of Law, pp. 288, 289.

But “by the common law the first will is presumed to be restored to its active energy by the canceling of the second.” *Taylor v. Taylor*, supra. The common law rule best harmonizes with the course of legislation and judicial decisions in this State, for the reason that the common law of England, so far as the same is applicable and of a general nature, is considered as of full force in this State where it is not repealed by legislative authority. Hurd’s Stat. 1899, p. 399. The rule above stated, as adopted by the ecclesiastical courts, is derived from the civil, and not the common law. *Taylor v. Taylor*, supra. In *Randall v. Beatty*, 31 N. J. Eq. 643, where a testatrix executed several wills, all of which she destroyed, except one executed in 1870, and where by a will made in 1873 she expressly revoked all former wills, but afterwards canceled the will of 1873, and where after her death the will of 1870 was found carefully preserved among her effects, it was held that the cancellation of the will of 1873 revived that of 1870, the court saying: “The rule on the subject of the revival of a prior will by the revocation of a later one containing words of revocation was, up to 1838 (when by the enactment of a statute—1 Vict., chap. 26—the question was put at rest), different in the courts of common law and the ecclesiastical courts in England, the former holding that the revocation of the later will, of itself, worked a revival (*Jarman on Wills*, 122, 123), while the latter held that, whether there was a revival or not, was a question of intention. *Usticke v. Bawden*, 2 Addams, 116. The will of 1870 was never canceled. * * * The will of 1870 was, at her death, found among her effects in an envelope, with a copy of her deceased husband’s will. It was entirely in her own handwriting. The law declares the manner in which a will is to be revoked. It must be by burning, canceling, tearing or obliterating it by the testator, or in his presence and by his direction and consent, or by a writing executed with the same formalities as a will.

No proof of declarations of revocation, made by the testator, will avail. * * * The will of 1870 is produced uncanceled. It is admitted that there is no revocatory will or writing extant, but it is alleged, that all such instruments subsequently made by the testatrix, have been canceled. The execution of the will of 1873 was not attended or followed by the cancellation of the will of 1870. Notwithstanding the revocatory clause in the will of 1873, the will of 1870 was retained by the testatrix uncanceled up to the day of her death. The fact, that she so kept the will, is the most cogent evidence of her intention that it should be revived by the cancellation of the will of 1873. * * * The true rule on the subject is, that, where one will is revoked by another, the revocation is testamentary, and the revocation of the latter will revives the former."

In *Lawson v. Morrison*, 2 Dal. 289, it was said: "It has been often determined that a will revoked by a subsequent will, but not cancelled, was re-established by the cancellation of the subsequent will."

Our conclusion is that, inasmuch as the later will executed by the testator, Jesse Stetson, must be presumed to have been destroyed by him in his lifetime, this loss or destruction has operated as a revival of the former will of December 3, 1897, although the later will contained a revocatory clause. For this reason the court below committed no error in dismissing the bill of the complainants. * * *

The decree of the circuit court is affirmed.

Decree affirmed.

PROBATE OF WILLS AND ADMINISTRATION OF ESTATES

DIVISION I

DECEDENTS' ESTATES

CHAPTER XII.

IN GENERAL.

Probate.

RICHARDS v. PIERCE.

44 Mich. 444, 7 N. W. 54. 1880.

CAMPBELL, J. Plaintiff brought ejectment for certain lands in Shiawasse county, which belonged to James Wadsworth, of Livingston county, New York, and were devised by his last will to various persons, from whom plaintiff derives title. These devises were partly in trust and partly directly, in the same proportions and for the same beneficiaries as would have taken the property by descent. The testator died in 1844 and his will was proved the same year in New York, but was not proved in Michigan until after this action was brought.

The only question argued before us was whether, before probate, ejectment could be brought by devisees or by those to whom their rights had been previously transferred. The general direction given by the court below to find a verdict for the defendant must have been given under misapprehension, as title was made out which would have been valid without a will, to a large share of the estate. But this seems to have escaped the notice of all parties, and is not material as the case stands.

There has never been any question of the right of a devisee to take his estate as of the death of the testator, and our statutes confine descents, and did when this testator died, to property which is not devised. Rev. St. 1838, p. 267. That this is so for all purposes except as otherwise provided by statute is not doubted. But it is claimed that the declaration of section 30, p. 275, Rev. St. 1838 (which is substantially the same as in subsequent revisions), that "no will shall be effectual to pass either real or personal estate, unless it shall have been duly proved and allowed in the probate court," makes every devise take effect from probate and not earlier, and if not for other purposes, does so for purposes of bringing action. As probate was always necessary to enable one to make proof of title of personalty, this statute cannot certainly impose any greater restrictions on realty than existed before on personalty.

There were undoubtedly some technical rules of common-law pleading which required an executor to make proof of his letters in pleading. But for any other purpose the decisions are uniform that probate merely furnished the means of establishing by a peculiar kind of record evidence the validity of an existing right; and that for every valuable purpose touching the existence and transfer of title the probate was retroactive, and had the same effect as if it had been had at the time of the testator's death. And so far as the statutes have been applied to devises, there is no material difference. Upon so familiar a rule it would not be profitable to multiply authorities, and a few illustrations will suffice as to the condition of things before probate.

The executor may release a cause of action. * * * He may sell goods. *Mayor of Norwich v. Johnson*, 3 Mod. 92. He may enter on a term and the entry be good though he die before probate. 3 Dyer, 367. He may sell a term of years, though he die before probate, and the sale will stand. *Brazier v. Hudson*, 8 Simons, 67.

In *Wankford v. Wankford*, 1 Salk. 299 and notes, the doctrine is quite fully discussed, and clearly laid down. And the practical result is said in *Brazier v. Hudson* to be that subsequent probate validates all acts that would be valid after. This may be a somewhat broad statement, but it is certainly true for most purposes, and authorities might be multiplied upon it.

In the United States the rule has been the same. After probate a conveyance previous thereto by a devisee has been held valid. *Spring v. Parkman*, 3 Fairf. 127. And in *De-Wolf v. Brown*, 15 Pick. 462, it was held the estate devised vested immediately both as to realty and personalty on the death of testator, so as to authorize suit for a taking of property connected with a farm before probate. The action then was after probate. Both these cases were under statutes like ours.

We have ourselves passed upon the question as to the immediate interest of a legatee in a mortgage which formed part of an estate in realty and personalty willed to her. In *Sutphen v. Ellis*, 35 Mich. 446, we held that an assignment of the mortgage made by the legatee who died before the will was proved, was valid. As already suggested, our statute puts realty and personalty on the same footing as to the necessity of probate.

In 3 Redfield on Wills, 23, a similar doctrine is laid down, but it is suggested there as well as in some other authorities that no action will lie before probate, and this seems to be asserted on an idea that in law no action accrues any earlier. We think this a misapprehension. The common-law authorities upon pleading require profert to be made in the declaration, and for this reason it is often said probate must then have been taken out. But we do not find any doctrine requiring probate before action brought, but only before declaring. In 1 Salk. 302, 303, before referred to, it is said that an action may be brought before Probate, but plaintiff cannot declare. Several authorities are collected in Comyn's Dig. "Administration," B, 9, to the effect that an action brought before probate is made good by subsequent probate, "for it is sufficient if the probate appears upon the declaration."

In *Thompson v. Reynolds*, 7 B. & C. 123, the true doctrine was more distinctly explained. In that case upon an issue made by plea and replication whether the plaintiff was executor in manner and form as averred in his declaration, in which he actually made profert of his letters, he was allowed to recover, although the proof showed the letters were not granted until some months after the declaration was filed. In equity also it has been held that proof of probate before the hearing is

sufficient, although occurring during the litigation. *Humphreys v. Humphreys*, 3 P. Wms. 349. And see *Comber's Case*, 1 P. Wms. 768.

It appears that the only objection that has been urged does not really go to the right of action, but only to the formalities of pleading; and that this forms no exception to the rule that the probate relates back. As under our forms of pleading the plaintiff in ejectment is not bound to aver the character of his title except as to its extent, there is no room for the formal objection, which has never even in personal actions been allowed to prevail if the party chose to make proper allegations, whether true or false.

We think the plaintiff had a right to bring his suit. The judgment must be reversed with costs and a new trial granted.

CHAPTER XIII.

ADMINISTRATION.

BROWN v. BAXTER ET AL.

77 Kan. 97, 94 Pac. 155. 1908.

GRAVES, J. Three assignments of error have been made: (1) The plaintiff is not the owner of the note and mortgage or the real party in interest. (2) The cause of action is barred by the statute of limitations. (3) The court erred in the admission of evidence. * * *

It is insisted that, when a citizen of the State of Ohio dies, the title to his personal property descends to his executor or administrator, and not to his heirs, and therefore the ownership of the note and mortgage involved in this action did not pass to M. J. Buchanan, or John Buchanan, deceased. Assuming, as we must in the absence of evidence to the contrary, that the law of the State of Ohio upon the subject is the same as it is in this State, we do not concur in this view.

Under §§ 1-32 of the law relating to descents and distributions, being chapter 33, Gen. St. 1901, the equitable title to the whole estate belonging to a decedent, real and personal, not exempt, descends directly to his heirs. The legal title to personal property passes to the administrator, if there be one, who holds it in trust for creditors, heirs, or legatees. *Fletcher v. Wormington*, 24 Kan. 264. When there are no debts, administration is unnecessary, and the heirs may collect the estate and make distribution among themselves. See 3 *Redfield on Wills*, p. 89; 17 *Am. & Eng. Ency. of Law* (2d Ed.) 742, where it is said: "If there are no creditors, the next of kin entitled to the estate may collect and make distribution among themselves without administration, but the court of probate still has jurisdiction to grant administration, though the estate owes no debts, and there is only one distributee." See, also, 18 *Cyc.* 62, where it is said: "In a number of states it is held

that administration is unnecessary where there are no debts of the estate or the debts have all been paid; the courts considering that when the only duty devolving on an administration would be to make a distribution of the estate, and the heirs or distributees make or are able to make a satisfactory distribution or disposition thereof themselves, or there is only one heir, administration would be merely a useless ceremony involving unnecessary expense, and the same is true where no administration has been applied for, and the claims of creditors, if any exist, are barred because they have not been presented to the probate court within the time limited for that purpose, or by the statute of limitations. But, if any of the heirs or distributees demand an administration, it must be had."

In the case of *Foote v. Foote*, 61 Mich 181, 28 N. W. 90, the court said: "The legal estate only in personal property vests in the administrators. The equitable estate therein is in the heirs, or other persons entitled to distributive portions thereof. The estate of the administrators therein is a trust for that purpose, and is created only for the purpose of laying hold of the estate and making such distribution. When there are no creditors, the heirs or legatees may collect, if they can, the estate together, and make such distribution among themselves as they may agree to and carry into effect, without the intervention of any administrators; and the law favors such arrangements. In such cases it is only where the heirs or legatees fail to make such collection and distribution that administration becomes necessary. When such arrangement and distribution have been made and executed, it will be binding, both in law and equity, as between the parties making it, whenever the rights of creditors do not intervene. And, where there are no creditors, the heirs or legatees may divide up and distribute the personal property of the decedent, without converting it into money, in such manner as they see fit; and, when such division has been executed, even though it is not such as the decedent has made by his will, or such as the law would make when there is no will, it will be binding upon all the parties to the agreement."

In the case of *Walworth v. Abel*, 52 Pa. 372, it is said: "No doubt the personal estate of a decedent vests in the administrator; but in trust for creditors and heirs or legatees. The

mere legal estate passes to the administrator. The equitable descends upon the parties entitled to distribution. If there be no creditors, the heirs have a complete equity in the property, and, if they choose, instead of taking letters of administration, to distribute it by arrangement made and executed amongst themselves, where is the principle which forbids it? The parties to such an arrangement executed would be forever equitably estopped from disturbing it, as amongst themselves, upon the most familiar principles of justice. And why shall the arrangement be broken up by a mere intermeddler? Family arrangements are favorites of the law, and when fairly made are never allowed to be disturbed by the parties, or any other for them." * * *

In this case there were no debts, except a few of small amount, which were paid. The assets were accessible to the heirs of the intestate, who lived where they could easily confer with each other. The appointment of an administrator was unnecessary, and the expenses incident thereto might well be avoided. The property belonged to the heirs exclusively, and it seems reasonable and just that they should have the right to divide it among themselves, and own, use, and dispose of it in severalty as any other property which they might own. The only person who could question such a transaction would be a creditor who had been overlooked and not paid. The possibility of that contingency had passed, however, some years before this action was commenced by lapse of time; more than three years having passed since the last date at which an administrator might have been appointed. * * *

The widow and each of the children of John Buchanan, deceased, testified at the trial to the settlement and division of the estate among themselves and the grandchildren of the deceased, and that it was satisfactory to all parties. The great lapse of time since the estate was settled, during which all parties have acquiesced therein and retained the amount received thereby is sufficient to estop them from hereafter objecting to the arrangement. The claim of the plaintiff in error that the note and mortgage are barred by the statute of limitations is placed upon the ground that Mary J. Buchanan did not become the owner thereof by the action of the heirs of John Buchanan, deceased, and therefore the payment of inter-

est to her did not prevent the running of the statute. The view we have taken of her rights in this respect, however, answers this objection, and the question need not be further considered.

This disposes of the assignments of error. No material error having been shown, the judgment is affirmed.

Jurisdiction.

SCOTT v. McNEAL ET AL.

154 U. S. 34. 1894.

In error to the Supreme Court of the State of Washington.

This was an action of ejectment, brought January 14, 1892, in the Superior Court of Thurston County in the State of Washington, by Moses H. Scott against John McNeal and Augustine McNeal to recover possession of a tract of land in that county.

At the trial, it was conceded that the title in this land was in the plaintiff until 1888; and he testified that he entered into possession thereof, and made improvements thereon, and had never parted with the possession, nor authorized anyone to go upon the land; that he had demanded possession of the defendants, and they had withheld it from him; and that its rental value was \$100 a year.

The defendants denied the plaintiff's title, and claimed title in themselves under a deed from an administrator of the plaintiff's estate, appointed in April, 1888; and in their answer alleged that in March, 1881, the plaintiff mysteriously disappeared from his place of abode, and without the knowledge of those with whom he had been accustomed to associate, and remained continuously away until July, 1891, and was generally believed by his former associates to be dead; and specifically alleged, and at the trial offered evidence tending to prove, the following facts:

On April 2, 1888, Mary Scott presented to the Probate Court of the County of Thurston, in the Territory of Washington, a petition for the appointment of R. H. Milroy as administrator of the estate of the plaintiff, alleging "that one Moses H. Scott, heretofore a resident of the above-named county and territory,

mysteriously disappeared some time during the month of March, 1881, and more than seven years ago; that careful inquiry made by relatives and friends of said Moses H. Scott, at different times since his said disappearance, has failed to give any trace or information of his whereabouts, or any evidence that he is still living; that your petitioner verily believes that said Moses H. Scott is dead, and has been dead from the time of his said disappearance;" that he was never married, and left no last will or testament yet heard of; that he left real estate in his own right in this county of the value of \$600, more or less; that his heirs were three minor children of a deceased brother; and that the petitioner was a judgment creditor of Scott.

Notice of that petition was given by posting in three public places, as required by law, a notice, dated April 7, 1888, signed by the probate judge, and in these words: "In the Probate Court of Thurston County, W. T. Mary Scott having filed in this court a petition praying for the appointment of R. H. Milroy as administrator of the estate of Moses H. Scott, notice is hereby given that the hearing and consideration of said petition has been fixed for Friday, April 20, 1888, at 10 o'clock a. m., at the office of the undersigned."

At the time thus appointed, the probate court, after appointing a guardian ad litem for said minors, and hearing witnesses, made an order by which, "it duly appearing that said Moses H. Scott disappeared over seven years ago, and that since said time nothing has been heard or known of him by his relatives and acquaintances, and that said relatives and acquaintances believe him to be dead; and that his surroundings, when last seen (about eight years ago), and the circumstances of that time and immediately and shortly afterwards, were such as to give his relatives and acquaintances the belief that he was murdered at about that time; and it appearing that he has estate in this county: Now, therefore, the court find that the said Moses H. Scott is dead to all legal intents and purposes, having died on or about March 25, 1888; and no objections having been filed or made to the said petition of Mary Scott, and the guardian ad litem of the minor heirs herein consenting, it is ordered that said R. H. Milroy be appointed administrator of said estate, and that letters of guardianship issue to him upon his filing a good and sufficient bond in the sum of one thousand

dollars." Letters of administration were issued to Milroy, and he gave bond accordingly.

On July 16, 1888, the probate court, on the petition of Milroy as administrator, and after the usual notice, and with the consent of the guardian ad litem of said minors, made an order, authorizing Milroy as administrator to sell all Scott's real estate. Pursuant to this order, he sold by public auction the land now in question, for the price of \$301.50, to Samuel C. Ward. On November 26, 1888, the probate court confirmed the sale, the land was conveyed to Ward, and the purchase money was received by Milroy, and was afterwards applied by him to the payment of a debt of Scott, secured by mortgage of the land.

On November 26, 1889, Ward conveyed this land by warranty deed to the defendants, for a consideration paid of \$800; and the defendants forthwith took and since retained possession of the land, and made valuable improvements thereon.

At the time of the offer of this evidence, the plaintiff objected to the admission of the proceedings in the probate court, upon the ground that they were absolutely void, because no administration on the estate of a live man could be valid, and the probate court had no jurisdiction to make the orders in question; and objected to the rest of the evidence as irrelevant and immaterial. But the court ruled that, the probate court having passed upon the sufficiency of the petition to give it jurisdiction, and having found that the law presumed Scott to be dead, its proceedings were not absolutely void; and therefore admitted the evidence objected to, and directed a verdict for the defendants, which was returned by the jury, and judgment rendered thereon. The plaintiff duly excepted to the rulings and instructions at the trial, and appealed to the Supreme Court of the state.

In that court, it was argued in his behalf "that to give effect to the probate proceedings under the circumstances would be to deprive him of his property without due process of law." But the court held the proceedings of the probate court to be valid, and therefore affirmed the judgment. 5 Wash. 309, 31 Pac. 873.

The plaintiff sued out this writ of error, and assigned for error that the probate proceedings, as regarded him and his estate, were without jurisdiction over the subject-matter, and

absolutely void; and that the judgment of the superior court of the state affirming that judgment, deprived him of his property without due process of law, and were contrary to the fourteenth amendment of the constitution of the United States.

GRAY, J., after stating the case, delivered the opinion of the court.

The plaintiff formerly owned the land in question, and still owns it, unless he has been deprived of it by a sale and conveyance, under order of the Probate Court of the County of Thurston and Territory of Washington, by an administrator of his estate, appointed by that court on April 20, upon a petition filed April 2, 1888.

The form of the order appointing the administrator is peculiar. By that order, after reciting that the plaintiff disappeared more than seven years before, and had not since been seen or heard of by his relatives and acquaintances, and that the circumstances at and immediately after the time when he was last seen, about eight years ago, were such as to give them the belief that he was murdered about that time, the probate court finds that he "is dead to all legal intents and purposes, having died on or about March 25, 1888"; that is to say, not at the time of his supposed murder, seven or eight years before, but within a month before the filing of the petition for administration. The order also, after directing that Milroy be appointed administrator, purports to direct that "letters of guardianship" issue to him upon his giving bond; but this was evidently a clerical error in the order or in the record, for it appears that he received letters of administration and qualified under them.

The fundamental question in the case is whether letters of administration upon the estate of a person who is in fact alive have any validity or effect as against him.

By the law of England and America, before the Declaration of Independence, and for almost a century afterwards, the absolute nullity of such letters was treated as beyond dispute.

In *Allen v. Dundas*, 3 Term R. 125, in 1789, in which the court of king's bench held that payment of a debt due to a deceased person to an executor who had obtained probate of a forged will discharged the debtor, notwithstanding the probate was afterwards declared null and void, and administration

granted to the next in kin, the decision went upon the ground that the probate, being a judicial act of the ecclesiastical court within its jurisdiction, could not, so long as it remained unrepealed, be impeached in the temporal courts. It was argued for the plaintiff that the case stood as if the creditor had not been dead, and had himself brought the action, in which case it was assumed, on all hands, that payment to an executor would be no defense. But the court clearly stated the essential distinction between the two cases. Mr. Justice Ashurst said: "The case of a probate of a supposed will during the life of the party may be distinguished from the present, because during his life the ecclesiastical court has no jurisdiction, nor can they inquire who is his representative; but, when the party is dead, it is within their jurisdiction." And Mr. Justice Buller said: "Then this case was compared to a probate of a supposed will of a living person; but in such a case the ecclesiastical court have no jurisdiction, and the probate can have no effect; their jurisdiction is only to grant probates of the wills of dead persons. The distinction in this respect is this: If they have jurisdiction, their sentence, as long as it stands unrepealed, shall avail in all other places; but where they have no jurisdiction, their whole proceedings are a nullity." *Id.* 130. And such is the law of England to this day. *Williams, Ex'rs* (9th ed.), 478, 1795; *Taylor, Ev.* (8th ed.) §§ 1677, 1714.

In *Griffith v. Frazier*, 8 Cranch, 9, 23, in 1814, this court, in speaking by Chief Justice Marshall, said: "To give the ordinary jurisdiction, a case in which, by law, letters of administration may issue, must be brought before him. In the common case of intestacy, it is clear that letters of administration must be granted to some person by the ordinary; and though they should be granted to one not entitled by law, still the act is binding until annulled by the competent authority, because he had power to grant letters of administration in the case. But suppose administration to be granted on the estate of a person not really dead. The act, all will admit, is totally void. Yet the ordinary must always inquire and decide whether the person, whose estate is to be committed to the care of others, be dead or in life. It is a branch of every cause in which letters of administration issue. Yet the decision of the ordinary that the person on whose estate he acts is dead, if the fact be

otherwise, does not invest the person he may appoint with the character of powers of an administrator. The case, in truth, was not one within his jurisdiction. It was not one in which he had a right to deliberate. It was not committed to him by law. And although one of the points occurs in all cases proper for his tribunal, yet that point cannot bring the subject within his jurisdiction." See also *Insurance Co. v. Tisdale*, 91 U. S. 238, 243; *Hegler v. Faulkner*, 153 U. S. 109, 118, 14 Sup. Ct. 779.

The same doctrine has been affirmed by the Supreme Court of Pennsylvania in a series of cases beginning 70 years ago. *McPherson v. Cunliff* (1824) 11 Serg. & R. 422, 430; *Peebles' Appeal* (1826) 15 Serg. & R. 39, 42; *Devlin v. Com.* (1882) 101 Pa. St. 273. In the last of those cases, it was held that a grant of letters of administration upon the estate of a person who, having been absent and unheard from for 15 years, was presumed to be dead, but who, as it afterwards appeared, was in fact alive, was absolutely void, and might be impeached collaterally.

The Supreme Judicial Court of Massachusetts, in 1861, upon full consideration, held that an appointment of an administrator of a man who was in fact alive, but had been absent and not heard from for more than seven years, was void, and that payment to such an administrator was no bar to an action brought by the man on his return; and, in answer to the suggestion of counsel, that "seven years' absence, upon leaving one's usual home or place of business, without being heard of, authorizes the judge of probate to treat the case as though the party were dead," the court said: "The error consists in this, that those facts are only presumptive evidence of death, and may always be controlled by other evidence showing that the fact was otherwise. The only jurisdiction is over the estate of the dead man. When the presumption arising from the absence of seven years is overthrown by the actual personal presence of the supposed dead man, it leaves no ground for sustaining the jurisdiction." *Jochumsen v. Bank*, 3 Allen, 87, 96. See, also, *Waters v. Stickney*, 12 Allen, 1, 13; *Day v. Floyd*, 130 Mass. 488, 489.

The Civil Code of Louisiana, in title 3, "Of Absentees," contains provisions for the appointment of a curator to take care of the property of any person, who is absent from or resides

out of the state, without having left an attorney therein; and for the putting of his presumptive heirs into provisional possession after he has been absent and not heard from for five, or, if he has left an attorney, seven, years, or sooner if there be strong presumption of his death; and for judicial sale, if necessary, of his movable or personal property, and safe investment of the proceeds; and, upon proof that he has not been heard from for 10 years, and has left no known heirs, for sale of his whole property and payment of the proceeds into the treasury of the state, as in the case of vacant successions; but neither the curator nor those in provisional possession can alienate or mortgage his immovables or real estate; and, if he returns at any time, he recovers his whole property, or the proceeds thereof, and a certain proportion of the annual revenues, depending upon the length of his absence. The main object of those provisions, as their careful regulations show, is to take possession of and preserve the property for the absent owner, not to deprive him of it upon an assumption that he is dead. Accordingly, the Supreme Court of Louisiana held that the appointment, by a court having jurisdiction of successions, of an administrator of the estate of a man represented to be dead, but who was in fact alive at the time of the appointment, was void; and that persons claiming land of his, under a sale by such administrator under order of the court, followed by long possession, could not hold the land against his heirs; and, speaking by Chief Justice Manning, said: "The title of Hotchkiss as administrator is null, because he had no authority to make it, and the prescription pleaded does not validate it. It was not a sale, the informalities of which are cured by a certain lapse of time and which becomes perfect through prescription; but it was void, because the court was without authority to order it. * * * It is urged, on the part of the defendants, that the decree of the court ordering the sale of the succession property should protect them, and, as the court which thus ordered the sale had jurisdiction of successions, it was not for them to look beyond it. But that is assuming as true that which we know was not true. The owner was not dead. There was no succession." And the court added that Chief Justice Marshall, in *Griffith v. Frazier*, above cited, disposed of that position. *Burns v. Van Loan* (1877) 29 La. Ann. 560, 563.

The absolute nullity of administration granted upon the estate of a living person has been directly adjudged or distinctly recognized in the courts of many other states. * * *

The only judicial opinions cited at the bar (except the judgment below in the present case) which tend to support the validity of letters of administration upon the estate of a living person were delivered in the courts of New York and New Jersey within the last 20 years.

In *Roderigas v. Institution*, 63 N. Y. 460, in 1875, a bare majority of the Court of Appeals of New York decided that payment of a deposit in a savings institution to an administrator under letter of administration issued in the lifetime of the depositor was a good defense in an action by an administrator appointed after his death, upon the ground that the statutes of the State of New York made it the duty of the surrogate, when applied to for administration on the estate of any person, to try and determine the question whether he was alive or dead, and therefore his determination of that question was conclusive. That decision was much criticised as soon as it appeared, notably by Chief Justice Redfield in 15 Am. Law Reg. (N. S.) 212. And in a subsequent case between the same parties in 1879 the same court unanimously reached a different conclusion, because evidence was produced that the surrogate never in fact considered the question of death, or had any evidence thereof,—thus making the validity of the letters of administration to depend not upon the question whether the man was dead, but upon the question whether the surrogate thought so. *Roderigas v. Institution*, 76 N. Y. 316.

In *Plume v. Institution*, 46 N. J. Law, 211, 230, in 1884, which was likewise an action to recover the amount of a deposit in a savings institution, the plaintiff had been appointed by the surrogate administrator of a man who, as the evidence tended to show, had neither drawn out any part of the deposit, nor been heard from, for more than 20 years; an inferior court certified to the Supreme Court of New Jersey the questions whether payment of the amount to the plaintiff would bar a recovery thereof by the depositor, and whether the plaintiff was entitled to recover; and that court, in giving judgment for the plaintiff, observed, by way of distinguishing the case from the authorities cited for the defendant, that “in most, if not all, of such cases,

it was affirmatively shown that the alleged defendant was actually alive at the time of the issuance of letters of administration, while in the present case there is no reason for even surmising such to have been the fact."

The grounds of the judgment of the Supreme Court of the State of Washington in the case at bar, as stated in its opinion, were that the equities of the case appeared to be with the defendants; that the court was inclined to follow the case of *Roderigas v. Institution*, 63 N. Y. 460; and that, under the laws of the territory, the probate court, on an application for letters of administration, had authority to find the fact as to the death of the intestate, the court saying: "Our statutes only authorize administration of the estates of deceased persons, and before granting letters of administration the court must be satisfied by proof of the death of the intestate. The proceeding is substantially in rem, and all parties must be held to have received notice of the institution and pendency of such proceedings, where notice is given as required by law. Sec. 1299 of the 1881 Code gave the probate court exclusive original jurisdiction in such matters, and authorized such court to summon parties and witnesses, and examine them touching any matter in controversy before said court or in the exercise of its jurisdiction." Such were the grounds upon which it was held that the plaintiff had not been deprived of his property without due process of law. 5 Wash. 309, 317, 318, 31 Pac. 873.

After giving to the opinion of the Supreme Court of the state the respectful consideration to which it is entitled, we are unable to concur in its conclusion or in the reasons on which it is founded.

The fourteenth article of amendment of the constitution of the United States, after other provisions which do not touch this case, ordains: "Nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." These prohibitions extend to all acts of the state, whether through its legislative, its executive, or its judicial authorities. *Virginia v. Rives*, 100 U. S. 313, 318, 319; *Ex parte Virginia*, Id. 339, 346; *Neal v. Delaware*, 103, U. S. 370, 397. And the first one, as said by Chief Justice Waite in *U. S. v. Cruikshank*, 92 U. S. 542, 554, repeating the words of Mr. Jus-

tice Johnson in *Bank v. Okely*, 4 Wheat. 235, 244, was intended "to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice."

Upon a writ of error to review the judgment of the highest court of a state upon the ground that the judgment was against a right claimed under the constitution of the United States, this court is no more bound by that court's construction of a statute of the territory or of the state, when the question is whether the statute provided for the notice required to constitute due process of law, than when the question is whether the statute created a contract which has been impaired by a subsequent law of the state, or whether the original liability created by the statute was such that a judgment upon it has not been given due faith and credit in the courts of another state. In every such case this court must decide for itself the true construction of the statute. *Huntington v. Attrill*, 146 U. S. 657, 683, 684, 13 Sup. Ct. 224; *Mobile & O. R. Co. v. Tennessee*, 153 U. S. 486, 492-495, 14 Sup. Ct. 968.

No judgment of a court is due process of law, if rendered without jurisdiction in the court, or without notice to the party.

The words "due process of law," when applied to judicial proceedings, as was said by Mr. Justice Field, speaking for this court, "mean a course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights. To give such proceedings any validity, there must be a tribunal competent by its constitution—that is, by the law of its creation—to pass upon the subject-matter of the suit; and, if that involves merely a determination of the personal liability of the defendant, he must be brought within its jurisdiction by service of process within the state, or his voluntary appearance." *Pennoyer v. Neff*, 95 U. S. 714, 733.

Even a judgment in proceedings strictly in rem binds only those who could have made themselves parties to the proceedings, and who had notice, either actually or by the thing condemned being first seized into the custody of the court. *The Mary*, 9 Cranch, 126, 144; *Hollingsworth v. Barbour*, 4 Pet. 466, 475; *Pennoyer v. Neff*, 95 U. S. 714, 727. And such a judgment is wholly void if a fact essential to the jurisdiction of

the court did not exist. The jurisdiction of a foreign court of admiralty, for instance, in some cases, as observed by Chief Justice Marshall, "unquestionably depends as well on the state of the thing as on the constitution of the court. If by any means whatever a prize court should be induced to condemn, as prize of war, a vessel which was never captured, it could not be contended that this condemnation operated a change of property." *Rose v. Himely*, 4 Cranch, 241, 269. Upon the same principle, a decree condemning a vessel for unlawfully taking clams, in violation of a statute which authorized proceedings for her forfeiture in the county in which the seizure was made, was held by this court to be void, and not to protect the officer making seizure from a suit by the owner of the vessel, in which it was proved that the seizure was not made in the same county, although the decree of condemnation recited that it was. *Thompson v. Whitman*, 18 Wall. 457.

The estate of a person supposed to be dead is not seized or taken into the custody of the court of probate upon the filing of a petition for administration, but only after and under the order granting that petition; and the adjudication of that court is not upon the question whether he is living or dead, but only upon the question whether and to whom letters of administration shall issue. *Insurance Co. v. Tisdale*, 91 U. S. 238, 243.

The local law on the subject, contained in the Code of 1881 of the territory of Washington, in force at the time of the proceedings now in question, and since continued in force by article 27, § 2, of the constitution of the state, does not appear to us to warrant the conclusion that the probate court is authorized to conclusively decide, as against a living person, that he is dead, and his estate therefore subject to be administered and disposed of by the probate court.

On the contrary, that law, in its very terms, appears to us to recognize and assume the death of the owner to be a fundamental condition and prerequisite to the exercise by the probate court of jurisdiction to grant letters testamentary or of administration upon his estate, or to license any one to sell his lands for the payment of his debts. By section 1, the common law of England, so far as not inconsistent with the constitution and laws of the United States, or with the local law, is made the rule of decision. In the light of the common law, the exclu-

sive original jurisdiction conferred by section 1299 upon the probate court in the probate of wills and the granting of letters testamentary or of administration is limited to the estates of persons deceased; and the power conferred by that section to summon and examine on oath, as parties or witnesses, executors and administrators or other persons intrusted with or accountable for the "estate of any deceased person," and "any person touching any matter of controversy before said court or in the exercise of its jurisdiction," is equally limited. By section 1340, wills are to be proved and letters testamentary or of administration are to be granted in the county of "which deceased was a resident," or in which "he may have died," or in which any part of his estate may be, "he having died out of the territory." By section 1388, administration of the estate of "a person dying intestate" is to be granted to relatives, next of kin, or creditors, in a certain order, with a proviso in case the person so entitled or interested neglect "for more than forty days after the death of the intestate" to apply for administration. By section 1389, an application for administration must "set forth the facts essential to giving the court jurisdiction of the case," and state "the names and places of residence of the heirs of the deceased, and that the deceased died without a will," and, by section 1391, notice of such application is to be given by posting in three public places in the county where the court is held a notice "containing the name of the decedent," the name of the applicant, and the time of hearing. And, by sections 1493 and 1494, a petition by an executor or administrator for the sale of real estate for the payment of debts must set forth "the amount of the personal estate that has come to his hands, and how much, if any, remains undisposed of, a list and the amounts of the debts outstanding against the deceased, as far as the same can be ascertained, a description of all the real estate of which the testator or intestate died seized, the condition and value of the respective lots and portions, the names and ages of the devisees, if any, and of the heirs of the deceased"; and must show that it is necessary to sell real estate "to pay the allowance to the family, the debts outstanding against the deceased, and the expenses of administration."

Under such a statute, according to the overwhelming weight

of authority, as shown by the cases cited in the earlier part of this opinion, the jurisdiction of the court to which is committed the control and management of the estates of deceased persons, by whatever name it is called,—ecclesiastical court, probate court, orphans' court, or court of the ordinary or the surrogate,—does not exist or take effect before death. All proceedings of such courts in the probate of wills and the granting of administrations depend upon the fact that a person is dead, and are null and void if he is alive. Their jurisdiction in this respect being limited to the estates of deceased persons, they have no jurisdiction whatever to administer and dispose of the estates of living persons of full age and sound mind, or to determine that a living man is dead, and thereupon undertake to dispose of his estate.

A court of probate must, indeed, inquire into the person whose will is sought to be proved or whose estate is sought to be administered, because without that fact, the court has no jurisdiction over his estate; and not because its decision upon the question, whether he is living or dead, can in any wise bind or estop him, or deprive him, while alive, of the title or control of his property.

As the jurisdiction to issue letters of administration upon his estate rests upon the fact of his death, so the notice given before issuing such letters assumes that fact, and is addressed, not to him, but to those who after his death may be interested in his estate, as next of kin, legatees, creditors, or otherwise. Notice to them cannot be notice to him, because all their interests are adverse to his. The whole thing, so far as he is concerned, is *res inter alios acta*.

Next of kin or legatees have no rights in the estate of a living person. His creditors, indeed, may, upon proper proceedings, and due notice to him, in a court of law or of equity, have specific portions of his property applied in satisfaction of their debts. But neither creditors nor purchasers can acquire any rights in his property through the action of a court of probate, or of an administrator appointed by that court, dealing, without any notice to him, with his whole estate as if he were dead.

The appointment by the probate court of an administrator of the estate of a living person, without notice to him, being

without jurisdiction, and wholly void as against him, all acts of the administrator, whether approved by that court or not, are equally void. The receipt of money by the administrator is no discharge of a debt, and a conveyance of property by the administrator passes no title.

The fact that a person has been absent and not heard from for seven years may create such a presumption of his death as, if not overcome by other proof, is such *prima facie* evidence of his death that the probate court may assume him to be dead, and appoint an administrator of his estate, and that such administrator may sue upon a debt due to him. But proof, under proper pleadings, even in a collateral suit, that he was alive at the time of the appointment of the administrator, controls and overthrows the *prima facie* evidence of his death, and establishes that the court had no jurisdiction and the administrator no authority; and he is not bound, either by the order appointing the administrator or by a judgment in any suit brought by the administrator against a third person, because he was not a party to and had no notice of either.

In a case decided in the circuit court of the United States for the southern district of New York in 1880, substantially like *Roderigas v. Institution*, as reported in 63 N. Y. 460, above cited, Judge Choate, in a learned and able opinion, held that letters of administration upon the estate of a living man, issued by the surrogate after judicially determining that he was dead, were null and void as against him; that payment of a debt to an administrator so appointed was no defense to an action by him against the debtor; and that to hold such administration to be valid against him would deprive him of his property without due process of law, within the meaning of the fourteenth amendment of the constitution of the United States. This court concurs in the proposition there announced "that it is not competent for a state, by a law declaring a judicial determination that a man is dead, made in his absence, and without any notice to or process issued against him, conclusive for the purpose of divesting him of his property and vesting it in an administrator, for the benefit of his creditors and next of kin, either absolutely or in favor of those only who innocently deal with such administrator. The immediate and necessary effect of such a law is to deprive him of his property without any

process of law whatever, as against him, although it is done by process of law against other people, his next of kin, to whom notice is given. Such a statutory declaration of estoppel by a judgment to which he is neither party nor privy, which has the immediate effect of divesting him of his property, is a direct violation of this constitutional guaranty." *Lavin v. Bank*, 18 Blatchf. 1, 24, 1 Fed. 641.

The defendants did not rely upon any statute of limitations, nor upon any statute allowing them for improvements made in good faith; but their sole reliance was upon a deed from an administrator, acting under the orders of a court which had no jurisdiction to appoint him or to confer any authority upon him, as against the plaintiff.

Judgment reversed, and case remanded to the supreme court of the state of Washington for further proceedings not inconsistent with this opinion.

In Re ZEPH'S ESTATE.

50 Hun 523, 3 N. Y. Supp. 460. 1888.

INGALLS, J. In November, 1887, Edward Zeph was an inhabitant of Schenectady county, in this state. He was indicted, tried, and convicted of the crime of murder in the second degree, and sentenced to the state prison for life, and is now in prison under such sentence. Fidel Zeph, the only brother of such convicted person, applied to such surrogate for letters of administration upon the estate of such prisoner, which were denied by the surrogate, upon the ground that he possessed no jurisdiction to grant such letters, as the said Edward Zeph was still living. We are convinced that the decision of the surrogate was correct.

The contention of the counsel for the appellant is that by force of such conviction and judgment thereon the said Edward Zeph became and is civilly dead, and that his estate became the subject of administration, the same as though he were actually dead. We are satisfied that the provisions of the Code of Civil Procedure, from which surrogates derive their authority to grant letters of administration, have no application to a case of civil death, but apply only to cases of

actual death. It will be perceived by referring to section 2660 of the Code of Civil Procedure, and the following sections upon that subject, that whenever mention is made of the estate upon which administration may be granted, the word "decedent" is employed; as, for instance, in said section 2660 the expression is found: "and of the next of kin of the decedent;" in section 2661, "that the decedent left no will." The same term is to be found in section 2663 and section 2665. We think that the word "decedent," as thus employed in framing the statute, was intended by the law-makers to be understood and applied in the usual and ordinary sense of the term. Webster defines the word "decease" as follows: "To depart from this life, to die." The word "decedent" is defined: "A deceased person."

There is nothing in the statute, which we discover, which in the slightest degree favors a construction that civil death was intended to be included as a ground for granting such administration. Indeed, the entire proceedings in regard to administering the estates of deceased persons seem to negative the idea that civil death was intended to be included within the cases provided for by such statute. Such right to administration should not be extended by implication, doubtful construction, or judicial legislation. If it should be deemed safe and judicious to include civil death as a ground for granting such letters of administration, the legislature must furnish the remedy, and not the court. The effect of imprisonment for life upon the civil rights of the prisoner was considered in *Avery v. Everett*, 36 Hun, 6; and upon appeal to the court of appeals the subject was elaborately discussed, and the decision of that court is to be found in 110 N. Y. 317, 18 N. E. 148, 1 L. R. A. 264, 6 Am. St. Rep. 368. We understand such decision to be, upon principle, adverse to the contention of the appellant's counsel herein.

It was suggested by such counsel, upon the argument, that the discussion of that question in the court of appeals should be regarded as obiter. We do not so regard it, as the question considered was involved in the case discussed by the members of the court, and concurred in generally by all the judges present, except Judge Earl, who delivered a dissenting opinion. Under such circumstances, we must regard such question as

within the determination of that court in that case, and, so far as it applies upon the question under consideration in this case, as conclusive herein.

The order of the surrogate should be affirmed. All concur.

JOHNSON v. JOHNSON.

15 R. I. 109, 23 Atl. 106. 1885.

MATTESON, J. This is an appeal from a decree of the court of probate of Cranston, appointing an administrator of the estate of Anna Johnson, deceased. The intestate died in Cranston on the 17th day of January, 1885. At and for several years prior to her death she had resided in Cranston, and in the family of Charles E. Johnson, the appellee, whose wife, also deceased, was her illegitimate daughter. The appellant, Walter H. Johnson, and his sister, Mary E. Seward, wife of Charles R. Seward, of Chicago, Ill., are children of the said Charles E. Johnson by his said wife, and grandchildren of the intestate. Both Charles E. Johnson and his son, the said Walter H. Johnson, made application to the court of probate to be appointed administrator. Mrs. Seward objected to the appointment of her brother, and requested the appointment of her father. The court appointed the father, and the son appealed.

The son claimed the appointment as next of kin of the intestate, under Pub. St., c. 184, § 4, which is as follows: "Administration of the estate, both real and personal, of a person dying intestate, shall be granted to the widow or next of kin of the intestate, being suitable persons, and of the age of twenty-one years, or to both, as the court of probate shall think fit." On the part of the father it was argued that Pub. St., c. 184, § 4, had no application, the son not being, in contemplation of law, next of kin of the intestate, because his mother, being the illegitimate daughter of the intestate, was not, at common law, of the kindred of the mother, though the same blood ran in their veins; and that while Pub. St., c. 187, § 7, in these words: "Bastards shall be capable of inheriting and transmitting inheritance on the part of their mother, in like manner as if they had been lawfully begotten of such mother"

—has so far changed the common law as to enable illegitimate children to take and transmit inheritances collaterally on the part of their mother, the statutes have nowhere made such illegitimate children kindred of their mother, and consequently, as the mother of the appellant was not kindred of the intestate, her son is not.

If we concede the force of this argument, and grant that the appellant is not, in legal contemplation, next of kin to the intestate, we nevertheless think that he is entitled to the appointment. If he is not to be regarded as such next of kin, then no application by such next of kin for letters of administration has been made within thirty days from the death of the intestate, and under Pub. St., c. 184, § 5, it is competent for the court to commit administration to some suitable person of full age, not a member of the court. For aught that appeared at the hearing, the appellant answers these requirements of the statute. In granting administration the primary object is the interest of the estate; hence courts have deemed it their duty to place the administration in the hands of the person most likely to convert the property to the best advantage of those beneficially interested. Other things being equal, that person will be he who is entitled as distributee, in whole or in part, to the residue of the estate after the claims of creditors have been satisfied, because of his interest. It is therefore an established principle governing courts exercising probate jurisdiction that the right to the administration of the effects of an intestate follows the property in them. * * *

In 1 Will. Ex'rs 436, the author remarks that both in the common law and spiritual courts it has always been considered that the object of the statutes of administration, 31 Edw. III, c. 11, and 21 Hen. VIII, c. 5, is to give the management of the property to the person who has the beneficial interest in it; and the inclination to effectuate this object has been so strong that in some instances not only the practice of the ecclesiastical court, but the decisions of the judges delegate, have not scrupled to disregard the express words of the statute; and he cites the cases of *Bridges v. Duke of Newcastle*, cited by the court in *West v. Willby*, 3 Phillim. Ecc. 381, and *Young v. Pierce*, Freem. 496. In the former, Lord Hollis had died intestate, and *Bridges* claimed administration as next of kin. The effects

were vested by act of parliament in the duke of Newcastle, to pay the debts of the deceased. The judge of the prerogative court, and afterwards the delegates, held that the next of kin was excluded on the ground that he had no interest, and granted administration to the duke of Newcastle. In the latter, administration was refused by the prerogative and the delegates to a next of kin on the ground that she had released her interest, and the letters were granted to the party beneficially entitled to the personal estate. And see, also, *Thornton v. Winston*, 4 Leigh (Va.) 153, 163; *Leverett v. Dismukes*, 10 Ga. 98, 99.

Under our statutes of descent and distribution (Pub. St., c. 187, §§ 1, 5, 7, 9), the appellant and his sister are the persons entitled to the surplus of the personal estate of the intestate after payment of her just debts, funeral charges, and the expenses of settling her estate. It follows, therefore, that they are the persons who would, if competent, be entitled to the administration. Mrs. Seward, however, is not an applicant, and, if she were, her coverture and nonresidence would probably be regarded as sufficient disqualifications to prevent her appointment. If there was any good reason against appointing her brother, her wishes in regard to the appointment would be entitled to consideration; but, in the absence of such reason, we cannot permit them to operate to his exclusion, he being equally entitled with herself, and both competent and desirous to act. *McBeth v. Hunt*, 2 Strob. (S. C.) 335; *Heron's Estate*, 6 Phila. (Pa.) 87, 88; *In re Cresse*, 28 N. J. Eq. 236, 237; *Cobb v. Newcomb*, 19 Pick. (Mass.) 336.

The decree of the court below must be reversed, and letters of administration granted to the appellant. Order accordingly.

Choses in Action.

BRADSHAW v. LANCASHIRE & Y. RY.

L. R. 10 C. P. 189 (Eng.). 1875.

At the trial, before Denman, J., at the last Manchester spring assizes, the facts were as follows: The female plaintiff was the executrix of the testator, and he, while traveling on the defendant's railway, had been injured by a railway accident. He

ultimately died from the injuries received, and it was not disputed that he had incurred expenses for medical attendance amounting to £40, and that the loss occasioned to his estate in respect of his being unable to attend to business previous to his death was £160.

It was contended, however, on the part of the defendants, that the maxim "*Actio personalis moritur cum persona*" applied, and that the action was not maintainable; and, secondly, that the damages for loss of business were too remote. The verdict was entered for the plaintiffs for £200, leave being reserved to the defendants to enter a verdict for themselves or to reduce the damages on the above grounds.

A rule nisi had been obtained accordingly.

GROVE, J. I am of opinion that this rule should be discharged. The action is brought by the executrix of a person whose death was caused by a railway accident, in respect of damages occasioned to the testator's estate. It is to be taken that the estate was damaged, not consequentially upon the testator's death, but by his inability to attend to his business in his lifetime, the direct and natural result of the injury he suffered. It is no doubt singular that up to the case of *Potter v. Metropolitan District Ry. Co.*, 30 L. T. (N. S.) 765, no action of this kind appears to have ever been brought, a circumstance which has been sometimes relied on as an argument against sanctioning a new form of action. It may, however, be that this is accounted for by the comparative infrequency of accidents of this sort in former times, and the fact that until Lord Campbell's act the right to damages for the personal injury, as compared with which the damages to the estate would generally be a small matter, was lost by the death of the party injured. The same argument might have been applied to the action in *Potter v. Metropolitan District Ry. Co.*, up to the decision of which case no action of the kind had ever been heard of, so far as I know, if we except the case put by way of illustration by Richardson, J., in *Knights v. Quarles*, 2 B. & B. 102.

The Court of Exchequer Chamber, nevertheless, held in that case that the action would lie, and by their decision we are bound, unless the present case is so far distinguishable as to

render the same principle inapplicable. I am of opinion that it is not, and there is a sufficient ground of action here. The ground of action in both cases is that there has been a breach of a contract made with the testator during his lifetime, whereby in his lifetime his estate was injured by his having to pay medical and other expenses, and injury to his business, the direct and immediate consequence of the accident.

Does the fact that, in this case, besides the injury to the estate, the testator's death has likewise resulted from the breach of contract, make any difference, or does the fact that provision has been made in such cases for compensation in respect of the death to certain relatives by Lord Campbell's act, take away any right of action that the executrix would have had but for that act? It does not seem to me that the act has that effect, either expressly or by necessary implication. The intention of the act was to give the personal representative a right to recover compensation as a trustee for children or other relatives left in a worse pecuniary position by reason of the injured person's death, not to affect any existing right belonging to the personal estate in general. There is no reason why the statute should interfere with any right of action an executor would have had at common law. In the case of such right of action he sues as legal owner of the general personal estate which has descended to him in course of law; under the act he sues as trustee in respect of a different right altogether on behalf of particular persons designated in the act. Another argument for the defendants was, that inasmuch as the remedy for the personal injury died with the person, the damages to the estate, being consequential on the personal injury, died also. I do not at all see that that follows as a necessary or logical consequence. The two sorts of damage are separable: the one is pecuniary loss to the estate immediately and naturally arising out of the accident; the other is personal to the party injured, and as such dies with the person. I do not see that there is any valid distinction between this case and that of *Potter v. Metropolitan District Ry. Co.*, or why the damage to the estate, that would clearly be recoverable if the injured party lived, should be the less recoverable because of his death. For these reasons, I am of opinion that the action is maintainable. * * *

DENMAN, J. I am of the same opinion. Whatever may be the usual form of action in such cases, it is quite clear that the declaration in this case was framed in contract. The damage alleged was damage to the estate of the testator, and at the trial two heads of damage were shown: viz., £160, damage in respect of the business, which it was agreed had suffered to that amount, and £40, medical and other expenses. I am of opinion that the plaintiffs are entitled to retain the verdict for the full amount of £200.

The first question was, whether the action can be maintained at all. The action is for breach of contract occurring in the lifetime of the testator, but which ultimately caused his death. And it was urged that the case fell within Lord Campbell's act, that the only action that could be brought was under that act, and that these damages could not be recovered as damages to the estate. This appears, no doubt, to be the first case of similar damages being sued for in an action like the present, but there is considerable authority for holding as we do.

In Williams on Executors, vol. 1, p. 798, a work in itself of great authority, all the cases on the subject are commented upon and the law is stated entirely in accordance with the dictum of Richardson, J., in *Knights v. Quarles*. It is distinctly laid down that an executor may recover damages to the personal estate arising out of a contract, though an action of tort might have been brought for the personal injury, resulting from the same act of defendant, before the death of the testator. The case of *Alton v. Midland Ry. Co.*, 19 C. B. (N. S.) 213; 34 L. J. (C. P.) 292, is also referred to in a note; and it is clear the learned author, who was a judge of this court, when that case was decided, looked upon the dictum of Willes, J., in that case as a confirmation of the opinion of Richardson, J., in *Knights v. Quarles*. He proceeds, however, to say that the rule there laid down must be taken to be limited by a qualification introduced by the modern decision of *Chamberlain v. Wilkinson*, 2 M. & S. 408, viz., that an action is purely personal, and there is no damage to the estate. In that case the action was for breach of promise of marriage, and the decision turns distinctly on the ground that there was no special damage stated on the record, and so the executor could not have an action because the only damages recoverable were purely per-

sonal. Here, the damages are not personal in their nature, but are damages to the estate, and the case falls, therefore, within the rule as laid down by Sir Edward Vaughan Williams, and not the exception.

Again, the case of *Potter v. Metropolitan District Ry. Co.*, though not exactly in point, is to some extent an authority in favor of the view we take. In one respect it was a stronger case, for it was doubtful there whether the declaration was in contract, whereas it clearly is so here. There the wife was the person to whom the injury was done, and she sued as executrix to her husband, who had died, in respect of the damage to the personal estate. The case was not, therefore, one of personal injury ultimately causing death, and consequently is not on all fours with the present. The principle, however, of the decision is quite consistent with our judgment in this case. The rule to enter a nonsuit must for these reasons be discharged. * * *

Rule discharged.

DIVISION II

GUARDIAN AND WARD

CHAPTER XIV.

DEFINITIONS AND GENERAL PRINCIPLES.

Guardianship in the United States.

IN THE MATTER OF ICHABOD ANDREWS, AN INFANT.

1 Johnson Ch. 99 (N. Y.). 1814.

The petition of Sarah Gilbert stated that she was the mother of the infant, who was born in October, 1807, and that in December, 1808, Justus Gilbert, the second husband of the petitioner, was, by the surrogate of Cayuga county, appointed guardian to the infant, and by virtue of that appointment possessed himself of the real and personal estate of the infant; that in January, 1812, Justus Gilbert absented himself from the petitioner in a secret manner and enlisted in the army of the United States for five years; that he is now on the western frontier, and has converted to his own use the personal estate, and the rent and profits of the real estate, and has lately attempted to dispose of the real estate; and that he is in habits of extreme intemperance, etc.; and that the infant is a charge on the petitioner, who prayed for relief, etc.

The facts in the petition were sworn to.

THE CHANCELLOR. Though the guardian was in this case appointed by the surrogate, under the act of 1813 (N. Y. Laws, Vol. 1, 454), he is as much under the superintendence and control of this court as if he had been appointed by it in the first instance. Power of the surrogate extends only to the appointment of the guardian; he has no general jurisdiction over him as trustee. That power remains unimpaired in this court, and

every guardian, however appointed, is responsible here for his conduct, and may be removed for misbehavior. It has repeatedly been declared that a testamentary or statute guardian is as much under the superintendence of the board of chancery as the guardian in socage. *Beaufort v. Berte*, 1 P. Wms. 704; *Eyre v. Countess of Shaftsbury*, 2 P. Wms. 107; *Rouch v. Garvar*, 1 Ves. 160. I shall, therefore, direct a reference to a master, to ascertain the proof of the allegations contained in the petition, and to report thereon.

Rule accordingly.

The Court Appointing.

TAFF v. HOSMER.

14 Mich. 249. 1866.

Special motion to dismiss a writ of error, to Wayne Circuit.

CAMPBELL, J. This is a motion to dismiss a writ of error, on two grounds: first, because Taff omitted to join in a former writ, which was dismissed; and second, because he is not entitled to consider himself aggrieved by the judgment below.

The case in the court below was an appeal from the allowance by the Probate Court of Wayne County of the last will of Cyrus W. Jackson, whereby he left all his property, with some small exceptions, to his son, Samuel W. Jackson, an infant of tender years, and appointed Bissell and Hosmer guardians and executors. The appeal was brought by Taff as grandfather of the child, who was an only child. * * *

We are, therefore, compelled to consider whether Mr. Taff has the right to consider himself aggrieved by the judgment below.

It appears that, instead of moving to dismiss his appeal in the Circuit Court, the proponents of the will joined issue with him on the merits, and the judgment affirming the will is also in form a personal judgment against him for costs. This liability is clearly a personal grievance of his own, upon which error may be brought, and the writ, therefore, is not irregular. But if he has no further interest in the judgment below, this would give him no right to dispute the will itself, and no error appears

to be assigned on this point. We are therefore called upon to examine the more serious question, whether he was legally interested in the main controversy.

The disposition of Mr. Jackson's estate and the appointment of guardians, are both contained in the same will, there being no codicils. We have no difficulty in holding that Taff could not contest a will merely disposing of the property. He is neither heir, devisee, nor next of kin, and is therefore a stranger to the inheritance. No case has been cited, and we presume none exists, which would favor any pretense of right to interfere with the disposition of property because he is next of kin to the heir, who is the only person living concerned in opposing a will which lessens his inheritance.

It is claimed, however, that Taff has a legal right to be heard upon any question involving the guardianship of his grandchild, and that on this account he may oppose the will, because the question of guardianship cannot be severed from the rest of that instrument.

Our statutes give to the father, and, where there is no father, to the mother (where capable of acting), control of the infant's person. 2 C. L. §§ 3303-4. In all other cases the guardian appointed by the Judge of Probate controls both persons and property. And where an infant is under fourteen years of age, the judge (except in the cases mentioned) is not compelled to select the guardian from any particular class of persons. § 3300. We do not find in the statute any right secured to any relatives but the father and mother, to retain control of the infant by any species of guardianship, and as the statute covers the entire subject, we must find his right, if it exists, in some form distinct from any absolute claim to appointment.

The question, then, arises, whether his relationship entitled him to be heard in any proceeding to obtain guardianship. If he could appear as a matter of right, upon any application for that purpose, we think it must follow that he could appear to contest the validity of a will appointing guardians. If he could not interfere of right in the one case, he is upon the same grounds a stranger to the other. Although, if the will is duly executed, no one can complain of the father's choice, yet we think it competent for such persons as are legally concerned to dispute the fact of any such choice having been made.

We are therefore to inquire what persons are considered as authorized to intervene in the Probate Court, besides the father and mother, and the infant himself.

The statute throws no light upon this question. It simply declares that "The Judge of Probate in each county, when it shall appear to him necessary or convenient, may appoint guardians to minors and others," etc.; § 3299; and that "if the minor is under the age of fourteen years, the judge of probate may nominate and appoint his guardian." § 3300. If we were to assume that this language was designed to exhaust the subject, we should be compelled to find that the law had placed infants under the age of fourteen in a complete state of isolation from all the ties of blood, and all the associations which we are apt to consider as natural bonds of union. It does not seem probable that any civilized legislation would deliberately cut him loose from his relatives altogether, and leave him entirely at the mercy of strangers. There can be no doubt that the judge of probate is the ultimate arbiter in the selection, but if no one else has any right to intervene to aid him in making a good and rejecting a bad choice, the condition of a helpless child would be most deplorable. And yet, if there is no law on the subject, it cannot be helped by any regrets.

We do not think the matter has been left in such an anomalous condition. Although probate courts are new institutions, unknown to the ancient law, and although the appointment of guardians is in this state vested in those courts, yet the jurisdiction is not in itself a new one, and must be considered as having been transferred with such of its incidents as can be properly exercised in the new tribunal. The power of appointing guardians is one which was formerly vested in the court of chancery. Authorities have not agreed upon its origin as a prerogative or a judicial authority, but it has long been settled that, so far as infants are concerned (although perhaps otherwise as to lunatics), the jurisdiction is one belonging to the court and not a personal one in the chancellor. *Ex parte Phillips*, 19 Ves. 118; 2 Fomblanque's Eq. 232. It has also been sometimes asserted that the jurisdiction of equity was one relating to property rather than to person, but while the court can rarely find it necessary to interfere when an infant has no estate, yet the jurisdiction does not depend upon that fact.

Wellesley v. Duke of Beaufort, 2 Russ. Ch. 21. We regret that upon the argument the authorities bearing upon this jurisdiction were not brought to our attention. We have been obliged to make such investigation as our own facilities have enabled us to pursue.

* * * * *

It is apparent that if there are not some persons besides the infant who have an absolute right to present their views concerning the guardianship, his interests will often be at the mercy of persons by no means calculated to protect him. And when the settled practice requires certain persons to be at liberty to appear before the master, and requires him to ascertain and report who are the infant's relations, it must be for some useful purpose, and not to preclude them from intervening. Mr. Hoffman evidently understood the English practice as providing for such intervention, and he expresses regret that the New York rules had not expressly required the same precautions adopted in England.—Hoffman's Master in Ch. 131, 132.

The case of Morehouse v. Cooke, Hopk. Ch. 226, is the only case we have been able to discover in which a statute like ours, so far as the original right of appointment is concerned, has received construction. In that case a guardian had been appointed on an ex parte hearing, without notice to the relations. One of these relatives, who had not appeared before the surrogate, appealed to the court of chancery. The chancellor sustained the appeal, censured the surrogate severely for not giving notice, and although the proceedings had been fair, and the guardian was unexceptionable, he removed him and appointed the appellant in his place.

The attention of the legislature being thus called to the subject, there are now express enactments on the subject in New York, requiring notice to be given, but only to such relatives as the surrogate may direct. This notice was by the Revised Statutes required to be given to all relatives by blood or affinity in the county. Underhill v. Dennis, 9 Paige, 206. Such a notice included, of course, many persons who had no interest as possible distributees, and the amendatory law, while it left the matter somewhat in the surrogate's discretion, did not confine the notice even to blood relations. The object of such a notice,

including so large a range of persons, was mainly to enable him to obtain information concerning the qualifications of candidates and the position of the infant; and it was accordingly held in *Kellinger v. Roe*, 7 Paige, 362, that such persons resisting an appointment, but not acting as petitioners, were not parties to the appeal of the unsuccessful applicant whom they had opposed. But in *Underhill v. Dennis*, 9 Paige, 202, where a person who was not a relative, but with whom the infant had been left by his mother, applied verbally to a surrogate and was refused guardianship, and appealed from a subsequent appointment of a guardian made on a written petition *ex parte* and without notice, the chancellor entertained the appeal, and reversed the decree as irregular, upon the express ground that notice should have been given to the relatives.

We are entirely satisfied that the next of kin may, if they see fit, make themselves parties to guardianship proceedings, and that when they do so, they may appeal from an adverse decision. And we are therefore of opinion that they may be proper parties to oppose the probate of a testamentary provision appointing guardians. This, of course, gives them no right to oppose it on any ground except that it is not a valid will, as a father's testamentary power cannot be reviewed. Neither does it give them rights to oppose the probate of any instrument not appointing guardians.

The motion must be denied, but under the circumstances we do not deem the plaintiffs entitled to costs. We shall be prepared to hear the case in its order on the merits.

The other justices concurred.

IN THE MATTER OF THE GUARDIANSHIP OF LAURA DANNEKER, A MINOR.

67 Cal. 643. 1885.

Application for a writ of prohibition. The facts are stated in the opinion of the court.

MYRICK, J. Application for a writ of prohibition to the Superior Court of the city and county of San Francisco, Department Nine.

On the 19th of June, 1885, one Teresa McGee presented her petition to the said Superior Court of the city and county of San Francisco, in which she averred that some six years ago Mrs. Danneker, a widow, the mother of the said Laura, placed the child under her care as Superioress of St. Joseph's Orphan Asylum, in said city and county; that afterward the mother died, leaving no estate except \$170, which had been expended in the maintenance of said Laura and two other of her minor children; that after the death of the mother the petitioner placed the said Laura under the care of a Mrs. Trendle, who agreed to support and raise her under her personal care; that afterward Mrs. Trendle, without the knowledge of petitioner, gave the custody of the child to Jacob Michelson, who had ever since had the custody of her, and that she was then at a boarding school in Alameda county, kept by Mrs. Kegler; that said child was then nine years of age, a full orphan, and had no property and no guardian; that said Michelson and Mrs. Trendle and the said child were residents of said city and county, though the child was temporarily at a school in Alameda county, and the petitioner prayed that letters of guardianship be issued to her.

The Superior Court made an order that citation issue, returnable June 30th, and that it be served on the said minor and on Jacob Michelson, Mrs. Trendle and Mrs. Kegler. The citation was duly served.

After the services of the citation, and on the 23rd of June (the return day of the citation being June 30th), the said Michelson presented a petition to one of the judges of the Superior Court of Alameda county, in which he averred that said minor was a resident of Alameda county, under the care of Mrs. Kegler, and had no guardian, and prayed for letters of guardianship. The petition was signed by said Michelson and C. P. Goff, as his attorney. In this petition no mention was made of the proceedings in the Superior Court of the city and county of San Francisco, and the judge in Alameda county, not being informed thereof, made an order for service of citation on Mrs. Kegler and Mrs. Trendle. On the return day, to wit, June 29th, after hearing evidence offered by Michelson, the court found that the minor resided in Alameda county, and granted the prayer of the petition of Michelson for letters. On

the return day of the citation in the Superior Court of the city and county of San Francisco, to wit, June 30th, the said Michelson, by his attorney, filed objections to the petition of the said Teresa McGee, and the hearing was postponed until July 14th, on which day the said Michelson, by his said attorney, presented a certified copy of the proceedings in the Superior Court of Alameda county, and moved that the petition of said Teresa McGee be dismissed, on the ground that the court had no jurisdiction, letters having been already granted to him by the Superior Court of Alameda county. Further hearing was continued to July 23rd, and before that day an alternative writ of prohibition herein was granted, and an order to show cause made.

There is no doubt that at the time the said Teresa McGee presented her petition to the Superior Court of the city and county of San Francisco, and citation was served on Michelson, and the others, that court had jurisdiction to hear and determine whether the minor was a resident of that city and county, and required a guardian, and whether the said Teresa was a proper person to be appointed. The question, then, is presented, could Michelson (instead of presenting the issue of residence and the other subjects involved to the Superior Court of the city and county of San Francisco), step over to Alameda county, obtain letters there, and thus oust the former court of jurisdiction to proceed? We think not. It is proper to presume that the Superior Court of Alameda county will, when its attention is brought to the fact that a petition was first filed in the city and county of San Francisco, revoke its order of appointment and recall its letters, to the end that there may be no conflict of jurisdiction. It is apparent that there cannot be two guardianships in two different courts at the same time. Letters will be issued, if necessary, by the court of the county where it may be legally determined the child resides.

* * * * *

We do not intend to prejudge the proceedings taken by either one; we desire merely to call attention to the risk that may have been run. * * *

The application for the writ is denied, and the order heretofore made is vacated.

MORRISON, C. J., and THORNTON, J., concurred.

As to the Ward's Property.

STATE v. CLARK.

16 Ind. 97. 1861.

Appeal from the St. Joseph's Common Pleas.

PERKINS, J. Suit upon a guardian's bond. * * *

Two questions of law are raised and argued by counsel which will be considered and decided. The ward, who now sues her guardian on his bond for wasting her estate, was supported by that guardian from infancy to the sixteenth year of her age. In that support, the guardian used the interest and a portion of the principal of her personal estate, without having first obtained the direction of the proper court. He set up that use in defense against this suit, and the defense was allowed. It is claimed, on the part of the appellant: 1. That the guardian cannot have a credit for such expenditure in any suit in any court. 2. That if he can, it will not be allowed in a suit on the bond.

If the credit is allowable at all, the account can be taken and the credit allowed, under our present practice, in the suit on the bond. *The State v. Strange*, 1 Ind. 538; *The State ex rel. v. Hughes*, 15 Id. 104. Can such a credit be allowed? As a question of power with regard now to the propriety of the allowance in this particular case, can the court make it in any case?

Blackstone says, Book 1, p. 462, that, "The power and reciprocal duty of a guardian and ward are the same, *pro tempore*, as that of a father and child; and therefore I shall not repeat them, but shall only add that the guardian, when the ward comes of age, is bound to give him an account of all that he has transacted on his behalf, and must answer for all losses by his wilful default or negligence. In order, therefore, to prevent disagreeable contests with young gentlemen, it has become a practice for many guardians, of large estates especially, to indemnify themselves, by applying to the Court of Chancery, acting under its direction, and accounting annually before the officers of that court. For the Lord Chancellor is, by right derived from the Crown, the general and supreme guardian of all infants, as well as idiots and lunatics; that is, of all such

persons as have not discretion enough to manage their own concerns. In case, therefore, any guardian abuses his trust, the court will check and punish him; and, sometimes, will proceed to the removal of him, and appoint another in his stead."

What is the obligation of a father touching the support of his child?

Walker, in his *American Law* (4th ed.), p. 258, said that there is no legal obligation at common law on the part of the father to support his infant children.

It is laid down in Blackstone, Book 1, p. 449, that "no person is bound to provide a maintenance for his issue, unless where the children are impotent and unable to work, either through infancy, disease, or accident, and then is only obliged (by 1 Anne, St. 1, ch. 30) to find them with necessaries, the penalty on refusal being no more than 20s. a month. For the policy of our laws, which are ever watchful to promote industry, did not mean a father to maintain his idle and lazy children in ease and indolence." See Ind. Dig. 492. But, see Reeves' Dom. Rel. 283. So, a step-father is not obliged to maintain the children which his wife may have had by a former husband. Note by Sharswood to 1 Black. Com. 449; Ind. Dig. 492; sections 2 and 3, Reeves' Dom. Rel. 285. The theory of the common law, then, its policy, is that children, when physically able are to support themselves by their own labor. Hence, the right on the part of the father, when he supports his child, to the earnings of such child, for a consideration of support. Hence, the rule that guardians should keep their wards employed in earning their own support, rather than to permit them to consume, in idleness, the principal of the patrimony.

But if the ward be physically unable to earn such support, or cannot do it without encroaching upon the time which should be devoted to acquiring a good English education, and the ward has property, the guardian may, and should if necessary encroach even on the principal of such property for the support and education of the child. Mr. Reeves, in his *Domestic Relations*, 324, says, "No guardian is bound to maintain his ward at his own expense, except he be the father; but whatever expense he is at for the ward's maintenance, the guardian shall be reimbursed out of the ward's estate." He further says, "the safest way for such guardian is for him to apply to Chancery

[or to the Probate Court], in the first instance, and procure the sanction of that court, for the expenditures he is about to make." See, also, 1 Black. Com. 462. But suppose he does not so apply, and makes expenditures for maintenance, without the previous direction of the court, can the court afterward allow them to be paid out of the principal of the ward's estate, if need be? The court will exercise great caution and scrutiny in allowing such expenditures to be charged upon the infant's estate. It may refuse the allowance. But it is in its power to make it, if it seems right so to do. This is settled in the matter of Bostwick, 2 John. Ch. 100, where Chancellor Kent states the history of the question, and the change of ruling upon it, in the English Chancery. See, also, other cases to the same point, in the 2d vol., pt. 2, of *Leading Cases in Equity*, 168; see, also, cases cited in *Harring v. Coles*, 2 Bradf. Sur. Rep. 349. Thus far we have examined the power of the guardian upon common law principles. It may be restricted by statutes. Has it been so restricted in this state? It had not, at the time the expenditures in this case were made, but had rather been enlarged. R. S. 1838, § 52, p. 103. Whether the power of a guardian or of the court had been restricted in later codes, we need not here inquire, though we are not aware of any such. It being, then, when the expenditures in this case were made by the guardian, a right possessed by him to make expenditures for the support of the ward, taking the risk of their allowance, as being reasonable, by the proper court; and the proper court having allowed them, after a jury had found them reasonable, this court could not disturb that allowance, where it would not set aside the verdict of a jury in other cases.

PER CURIAM. The judgment is affirmed, with costs.

PART II

LEADING ILLUSTRATIVE CASES

INSURANCE

FUNDAMENTAL PRINCIPLES

CHAPTER II.

INSURABLE INTEREST.

Insurable Interest in Property.

SIBLEY v. PRESCOTT INS. CO.

Supreme Court of Michigan, 1885. 57 Mich. 14, 23 N. W. 473.

COOLEY, C. J. This cause was tried by the circuit judge without a jury, and the facts as found are substantially as follows:

January 28, 1884, Thomas Swan, of Detroit, made a voluntary assignment to the plaintiff for the benefit of his creditors, under the "Act to provide for the regulation and enforcement of assignments for the benefit of creditors," approved May 13, 1879 (Pub. Acts, 181). The assignment and the acceptance thereof by the plaintiff were duly filed January 29, 1884. * * *

The policy in suit was issued to plaintiff as assignee and insured him to amount of \$2,500—\$1,250 on the stock and \$1,250 on furniture and fixtures assigned—but not exceeding his interest in the property. * * *

February 5, 1884, before Sibley had filed his bond and qualified as assignee, there was a fire, and the property insured was damaged by fire. Two days later Sibley qualified as assignee by filing the statutory bond and inventory. * * *

Plaintiff brought suit on the policy. The defendant insisted

under the foregoing facts that plaintiff, not having filed his bond as assignee, had no insurable interest. * * *

The acceptance of the assignment and the taking possession of the property create a trust with the assignee as trustee, and the assignee may defend the trust by the institution of any necessary suits for the purpose. *Coots v. Radford*, 47 Mich. 37; S. C. 10 N. W. Rep. 69. The trusteeship is, indeed, for the time being imperfect, for he cannot proceed in its execution before the bond is filed. It is subject to a contingency in the nature of a condition subsequent which may defeat his power to act without destroying the trust; but that, in the meantime, he may do whatever may be found necessary for the protection of the interests of the beneficiaries in the assigned property is recognized by the case just cited. The assignor has transferred to him the legal title for that purpose, and his power to act as trustee is merely suspended for the time being, until certain acts shall be done which are essential to give due protection to parties concerned. But that he may insure the property against destruction by fire in the meantime we have no doubt. He may do so just as properly and with as much right as he may by force or by suit defend his possession against trespassers. But it is further contended that this does not make the plaintiff sole and unconditional owner, and as his interest was not truly stated in the policy, the policy is void for that reason.

The policy was issued to the plaintiff as assignee. The defendant was therefore apprised that the plaintiff was not asking insurance in his own right, but in some right which had come to him by assignment. The statement in that regard in the policy was true as far as it went, and if defendant wanted anything further it should have been called for. There was no deception and no concealment in the case; plaintiff had such ownership of the property as was in any one; and though it was not unconditional, the designation of the plaintiff as trustee would be sufficiently suggestive of a condition to put the insurer upon inquiry. If the defendant failed to make inquiry, it must be deemed satisfied with such information as it possessed.

An argument is also made that the plaintiff had no insurable interest because the policies, which passed to him with the assignment, more than covered the loss. But this, we conceive, is at best only specious. Whether the policies came to him with the

trust, or whether he took them out himself, would make no difference; he had the property with the policies upon it, and might take out further insurance as any owner might, subject to the customary conditions as to information, over-valuation, etc.

ROHRBACH v. GERMANIA FIRE INS. CO.

Court of Appeals of New York, 1875. 62 N. Y. 47.

FOLGER, J. The plaintiff cannot maintain this action unless he had an insurable interest in the buildings which were the subject of the risk taken by the defendants, and which were destroyed by fire. He seeks to found such an interest upon the instrument in writing executed by his wife after her marriage to him.

Without entering minutely into a consideration of the effect of the marriage upon her pre-existing obligations and liabilities to him, it is sufficient to say that the instrument executed by her was based upon a consideration adequate to uphold her express promise; that though made by a married woman it was in due form to affect her separate estate; and that though a transaction between a wife and her husband, yet equity would have upheld and enforced it in his favor against her had she lived, and will enforce it against her estate now that she is dead. By it he was an equitable creditor of her estate at the time of the insurance; but he was no more than a general creditor. Though the instrument contains the phrase, "shall be a lien on my property," no specific lien was thereby created, and so far as that instrument had effect, no more than a general equitable lien, yet to be enforced and made specific by a judgment in an equitable action. The plaintiff stood thereby in no better plight, so far as having an insurable interest in the building, than would have stood a creditor of the deceased wife who held a judgment only, rendered and docketed against her, which would have become a general lien upon her real property. He did not stand in so good plight but for other facts now to be mentioned. She had died after giving the instrument, leaving personal and only this real estate; a person other than the plaintiff had taken out letters of administration; the personal estate was by much insufficient to pay the debts against her; and this real estate, in-

cluding the insured buildings, would in the due course of administration, for a space of at least three years from the granting of letters of administration, be liable to sale for the purpose of meeting her liabilities, and it was the only fund to which plaintiff could look for payment; the plaintiff was in the possession of the buildings, occupying them at the time of the fire. Judgment creditors, if any, would have had a preference in payment from the personal estate (2 R. S. 87, 27, sups. 3, 4), and, of course, the lien acquired by the docketing of their judgments could not be disturbed by the application of the administrator for leave to sell the real estate for the payment of debts, and the obtaining of permission to do so. But yet the plaintiff had a right to compel an accounting by the administrator (2 R. S. 92, 52), and a sale of the real estate (*id.* 108, 48), for the payment of his and other debts. Thus, the real estate was to a degree subject to the payment thereof, and was in fact, from the slender amount of the personal property, substantially all that he could look to for payment. His position was not as good in some respects as that of a judgment creditor, but it was not unlike it; both had a right to have the real estate sold for the payment of their debts; for a certain space of time it could not escape the exercise of that right; and it cannot be said that the interest of a judgment creditor in the real estate, as an interest in property, was greater or nearer than that of the plaintiff. It was more manageable, but not more direct in the end. * * *

I conclude that a creditor of the estate of one deceased, whose personal property left is insufficient for the payment of his debts, has an insurable interest in the sole real estate of the deceased debtor when it is plain that if it is damaged by fire a pecuniary loss must ensue to the creditor thereby.

CUMBERLAND BONE CO. v. ANDES INSURANCE CO.

Supreme Judicial Court of Maine, 1874. 64 Me. 466.

BARROWS, J. The plaintiffs claim to recover a loss of \$2,000 under a policy issued by the defendants upon a stock of fish scrap contained in the Atlantic Oil Company's Works in Boothbay.

* * * * *

Maddox, a manufacturer of porgy oil and fish scrap, dry and

crude, in pursuance of negotiations with the plaintiffs looking to his furnishing them with large quantities of dried fish scrap, had received advances from the plaintiffs before the taking out of this policy to the amount of \$2,000, and had the dried fish scrap on hand to an amount in value considerably exceeding the sum advanced by the plaintiffs.

As the fish scrap or porgy chum was not wanted by plaintiffs until the following season, it remained at the Oil Company's Works, not separated from that belonging to Maddox, under Maddox's agreement to store it for plaintiffs, free of expense, and deliver it when wanted, and to get it insured in order to secure the plaintiffs' advances.

In pursuance of this agreement Maddox told the agent of the defendant company that plaintiffs had scrap at Boothbay, that they had made advances to him to the amount of \$2,000, and he wanted a policy to protect their interest in case of loss. He procured a policy on his own interest at the same time for a like amount. The cash value of the whole stock of fish scrap at the time of the insurance and of the fire was \$5,000, and it was very nearly a total loss. No part of it had ever been delivered to plaintiffs, but Maddox stated fully to the agent of the insurance company the situation and condition of the stock "and the risk the company was taking just as it was."

He testified in substance that the porgy chum burned was the same upon which the plaintiffs had made the advancements to him; that there were 150 tons in the whole, of which he owned three-fifths and the Cumberland Bone Company two-fifths by virtue of the advances made him; that he held it for them to be delivered as wanted.

The insurance company paid the amount of the policy running to Maddox, but resisted the claims of the plaintiffs on the ground that Maddox had made no delivery to them, that the property in no specific part of the porgy chum had ever passed from Maddox to the plaintiffs, was not at their risk, and so they had no insurable interest.

If it were essential to the existence of an insurable interest that assured should have a legal title to the property upon which the insurance is effected, the case would present a different and perhaps more difficult question. But such is not the law. An equitable interest suffices. Chancellor Kent lays down the law

thus: "The interest need not be a property in the subject." "It may consist in having some relation or concern in the subject of the insurance, which relation or concern may be so affected by the peril as to produce damage."

The result is that a person so circumstanced that he is interested in the safety of a thing, derives a benefit from its existence and suffers prejudice from its destruction, has an interest in that thing which is the lawful subject of insurance. * * *

We think that the plaintiffs under the facts here developed had such an interest in the subject of insurance. Maddox was holding it in good faith in trust for them. He recognized the interest they had acquired in it by their advances, held it subject to their order, and procured the insurance in their name to protect their advances, refraining from insuring it in his own, and making known to Mr. Plummer, the defendants' agent, the situation and condition of the property, and the fact that advancements had been made to him thereon by the plaintiffs, and that the object of the policy was to protect those advances. It is true that so long as Maddox was solvent, the plaintiffs might not lose by the destruction of the property. But the same is true of every mortgagee or pledgee. We fail to see how the insurers could be injuriously affected, suppose it true that the agent understood that the part belonging to the plaintiffs had been separated, weighed off, and formally delivered. It does not appear that the risk they assumed was changed or affected.

FARMERS' MUT. INS. CO. v. NEW HOLLAND TURNPIKE ROAD CO.

Supreme Court of Pennsylvania, 1888. 122 Pa. 37, 15 Atl. 563.

GREEN, J. We cannot understand upon what principle evidence was admitted to prove loss of tolls on the turnpike road of the plaintiff. The contract in suit was a policy of fire insurance on a bridge. The bridge having been destroyed by fire, if there was liability on the part of the insurance company, the measure of that liability would be the value of the loss, which would consist of the injury to the bridge. If the bridge was totally destroyed, the loss would be the total amount of the in-

insurance; but, if only partially destroyed, it would be the value of the injury. In no circumstances can there be a legitimate measure of liability on a fire insurance policy which represents the loss of profits of a business which might be carried on at the structure destroyed, if it were standing. Such is not the contract of the parties. Neither is there any liability, as for rent of the premises destroyed, or for any other advantage which may have been derived from its use. If a period of time elapses before the building is restored, or if it is never restored, the liability of the insurer is not for a loss of the use or rental of the building, but for the value of the loss, with interest on the same until payment is made. These fundamental principles, which are inherent in the contract of insurance, were disregarded when the plaintiff was permitted to prove the loss of tolls for non-user of the bridge while it was being rebuilt. * * *

We think it was also error to permit the county of Lancaster to interplead as a claimant. There was no contract of insurance with the county, and after intervening there could be no recovery as for any loss sustained by the county. There was no identity of interest in the bridge as between the turnpike company and the county. If the turnpike company had any interest in it, it was that interest which was represented by the amount of its contribution to the cost of the bridge; but in that contribution the county necessarily could have no interest. The whole of it belonged to the turnpike company, and no part of it, in any contingency, belonged to the county. The principle recognized in *Mittenberger v. Beacon*, 9 Pa. St. 198, has no application. * * *

The more important question, however, is whether the turnpike company had any insurable interest in the bridge. It is a novel question, but perhaps not difficult of solution. The basis upon which the insurable interest is claimed to exist is the fact that the turnpike company contributed \$5,500 to the cost of erecting the bridge, being one-third its total cost, \$16,500. If this contribution was compulsory—that is, legally compulsory—it would perhaps have to be admitted that an interest in the bridge, legal or equitable, would necessarily flow from it; for it cannot be supposed that the law would oblige any person or corporation to contribute directly to the cost of erecting a structure without conferring an interest in the structure which the law would recognize and enforce. While saying this, we do not, of

course, refer to that kind of contribution which is accomplished by the payment of taxes. Such contribution is, of course, for public use, and confers no title or interest upon the tax-payer in structures which may be erected with public funds. But in this case there is no pretense of any compulsion upon the turnpike company. The evidence as to the payment of the money is barren of information, except as to the mere fact of the payment. There is absolutely no testimony to prove why, or upon what consideration, or for what purpose or reason, the turnpike company paid any part of the cost of erecting the bridge. It is not difficult to imagine a reason, since, as the company's road crossed the stream over which the bridge was erected, it would be quite desirable for them to have a bridge over which persons using the road could travel. But while that might be a reason for the company building a bridge of its own, it was still the fact that the bridge was a public county bridge, free to all travel, built many years before by a private person, who transferred it to the county, and hence the property of the county exclusively. Being thus a free, public bridge, there could not possibly be any private estate or ownership in it. The turnpike company could charge no tolls for passing over it. They could exercise no acts of ownership over it. They could not obstruct it, nor take it down, even to rebuild it, without the consent of the county, and perhaps not even with such consent, as it was a part of the public highway. In point of fact, while the turnpike company did contribute the third part of the cost of its erection, after the former bridge had fallen down, the county at that time paid the other two-thirds of the cost, and re-erected the bridge in discharge of its undoubted legal obligation to do so. And so after its destruction by fire, in 1882, it was again rebuilt by the county as a public county bridge, in obedience to a general law of this commonwealth (act May 5, 1876, P. L. 112) and the decree of this court (*Myers v. Com.*, 1 Atl. Rep. 264). All this was done without any cost to this plaintiff, who now enjoys the use of the bridge in the same manner and to the same extent as before the fire. The only injury the plaintiff has sustained by the fire is in being deprived of the use of the bridge, not as its own, but as a part of the public highway, during the period of the reconstruction of the bridge. But for that injury the defendant was not responsible in any sense, and it never assumed an obligation

to make compensation for it. The county was legally charged with the duty of rebuilding, and, however an argument might be made against the county for not performing its duty in that regard with promptness, it is perfectly manifest that the breach of that duty by the county conferred no right of action against the defendant insurance company.

What, then, remains to impose any liability upon the defendant? The bridge is restored without any expense to the plaintiff. Every right which the plaintiff enjoyed before the fire is enjoyed since, so far as the bridge is concerned, without any additional cost to the plaintiff. It may be remarked, in passing, that the right of the plaintiff in the bridge is only the public and common right of its patrons, as citizens, to use the bridge as a part of the public highway. It is therefore not a right peculiar to the plaintiff in any sense. It may well be questioned, even if the plaintiff had an insurable interest in the bridge, whether any injury has been sustained to that interest, sufficient to impose any liability upon the defendant as an insurer. Suppose a recovery is permitted, and the plaintiff recovers the amount of the insurance money. As they are not obliged to expend the money in reconstruction, and yet reconstruction has been accomplished without cost to them, they simply get back and keep the money they voluntarily contributed in 1868 in the construction of the bridge. But if the bridge had not burned down, that money could not have been recovered. How, then, were they injured by the fire? They have the bridge as they had it before, without cost to them; and the diminution of their tolls, during the period of reconstruction, cannot be compensated in an action on the policy. For this reason, therefore, if for no other, we cannot discover any cause of action against this defendant. But independently of this consideration, all the definitions of an "insurable interest" import an interest in the property insured which can be enforced at law or in equity. Thus we said in *Miltenberger v. Beacon*, 9 Pa. St. 199: "It is accordingly recognized as a rule, in this department of the law, that almost any qualified property in the thing insured, or any reasonable expectation of profit or advantage to spring from it, may be the subject of this species of contract, provided it be founded in some legal or equitable title." In 1 Wood, Ins. 625, 626, it is said: "A right, too, must be of such a nature, in order

to constitute an interest, as the law will recognize and enforce; for a mere moral title will not sustain an insurance." *Fland. Ins.* 388: "A mere general interest, not susceptible of enforcement, which does not specifically apply either in terms or by the operation of law, is not insurable." 1 *Wood*, *Ins.* 656: "The interest must be enforceable either at law or in equity." *Wilson v. Insurance Co.*, 19 Pa. St. 374: "Interest in the property insured is an essential link in the relation of insurance." *Sweeny v. Insurance Co.*, 20 Pa. St. 342: "The rule is valuable and well founded that he who has no interest can have no insurance. That he must show his interest, and that it is the extreme measure of his recovery, are the corollaries of the rule." *Insurance v. Murray*, 73 Pa. St. 28: "Hence the court was correct in charging that the insurable interest of the lessees was to the extent of the value of the property which they were bound to replace." See, also, *Grevemeyer v. Insurance Co.*, 62 Pa. St. 340. It is unnecessary to multiply citations. There was clearly no interest in the bridge, belonging to the turnpike company, which could be recognized or enforced, either at law or in equity. There could not be any right of property of any kind, nor of possession nor of custody. Even the use of it was not a use by the plaintiff in its corporate capacity, but a mere right of passage over it, which belonged to all citizens in common. The money which was contributed to its construction by the plaintiff was a mere gratuity, which it was not bound to give, and which it could never recover. In such circumstances, there was no interest or property in the bridge as a structure, and hence no insurable interest capable of protection and enforcement. * * *

Insurable Interest in Lives.

RESERVE MUTUAL INS. CO. v. KANE.

Supreme Court of Pennsylvania, 1876. 81 Pa. 154.

[The plaintiff sought to recover on a policy of life insurance effected by him upon the life of his father, a laborer, whose passage money from Ireland had been paid by the plaintiff.]

PER CURIAM. By the 28th section of the Poor Law of June 13, 1876, the father and grandfather, and the mother and grand-

mother, and the children and grandchildren of every poor person not able to work, shall at their own charge, being of sufficient ability, relieve and maintain such poor person, at such rate as the Court of Quarter Sessions of the proper county shall order and direct. Maintenance of a father or mother unable to work is, therefore, a legal liability. When we add to this the feelings of natural affection and the desire produced by these feelings to provide for the comforts of parents, the right to effect an insurance on the life of the parent, to carry out these purposes, ought not to be denied. It would be technical in the extreme to say that a son has no insurable interest in his father's life. Poverty may overtake the father in his lifetime, and thus both father and mother be cast upon the son; or if the father die before her, the necessity may fall at once upon the son. Why then should he not be permitted to make a provision, by insurance, to reimburse himself for his outlays, past or future? What injury is done to the insurance company? They receive the full premium, and they know, in such case, from the very relationship of the parties, that the contract is not a mere gambling adventure but is founded in the best feelings of our nature, and on a legal duty which may arise at any time. We are of opinion that the policy is not void.

ULRICH v. REINOEHL.

Supreme Court of Pennsylvania, 1891. 143 Pa. 238,
13 L. R. A. 433.

PAXSON, C. J. This case is not free from difficulty. It has been twice argued, and has received a most careful consideration. It presents the question, to what extent a creditor may lawfully insure the life of his debtor. We have avoided ruling this point before, because it was one of grave importance, and the cases in which it was raised did not necessarily require it, nor did they present all the facts necessary to enable us to dispose of it satisfactorily. This record raises the whole question squarely.

The facts are substantially as follows: The defendants are doing a firm business at Lebanon, Pa., and hold a judgment against one Andrew Bleistine, in the court of common pleas of Lebanon county, which, with interest and costs, amounted to

\$110.02. The judgment was sufficiently secured on real estate, and the defendants were not pressing their debtor for the money. He was being pressed by other creditors, who held subsequent liens on his property. It was necessary to quiet them for Bleistine to pay off the judgment held by the defendants, or get rid of it in some manner. Not having the money, he applied to the defendants to satisfy it, and take a policy on his life instead. The evidence is uncontradicted that the defendants were averse to this, and for a time declined, but finally yielded to Bleistine's entreaties, and his wife's tears, to save their home. The evidence shows that Bleistine offered them an insurance of \$3,000 or \$5,000 or \$10,000 or any amount they wanted. The negotiation resulted in the defendants taking a policy of \$3,000 on the life of Bleistine in the U. B. Mutual Aid Society. The policy was issued in the name of Bleistine as beneficiary, and afterwards assigned by him to the defendants, who paid the entrance fee and all subsequent assessments. The assignment was absolute, and not as collateral security, and the judgment referred to was satisfied of record. After Bleistine's death, the insurance money was paid by the company to the defendants. Subsequently this suit was brought by the executor of Bleistine to recover from them the amount received over the debt and interest and premiums paid; the plaintiff alleging that the amount of insurance was so disproportioned to the debt as to make it a gambling transaction, within the doctrine of *Gilbert v. Moose*, 104 Pa. St. 74, and the cases following it. * * *

The first and second assignments present the main question in the case. Upon the trial below, the defendants proved, under exception, the life expectancy of Bleistine, and the amount of assessments on this policy had he lived out his full life expectancy. It appears from this evidence that the insured was 42 years of age, and that his expectation of life, according to the Carlisle tables, was 26 years; that had he lived that length of time the interest on the judgment, with the annual dues and assessments and interest thereon, would have amounted to \$4,336.31, being \$1,336.31 in excess of the amount of the policy. This evidence was not contradicted. Its admission forms the subject of the first assignment. In the second assignment complaint is made that the learned judge erred in his answer to the plaintiff's sixth point. The point is as follows: "The amount

allowed and paid as the consideration of the transfer of the insurance, to-wit, the sum of \$99.51, with interest thereon from December 7, 1875, to April 2, 1877, and the costs, were grossly inadequate, and the disproportion between that amount and the amount of the insurance (\$3,000) is so great as to require the court to say, as matter of law, that the transaction was a wager, and that in this action Reinoehl & Meily have no right to retain more of the insurance money received by them than the amount of their satisfied judgment, with interest and costs, and the premiums and assessments paid by them, with interest thereon; and therefore the verdict of the jury must be in favor of the plaintiff for the amount received by the defendants, with interest from the date of its receipt, less the amount of the judgment, interest and costs, and assessments and premiums paid, with interest." This point was refused.

Whether the question of excess of insurance is to be disposed of by the court as a matter of law, or by the jury as a question of fact, it is essential that we should have a fixed rule. We have none now. I felt the importance of this in delivering the opinion of the court in *Grant's Adm'rs v. Kline*, 115 Pa. St. 618, 9 Atl. Rep. 150, where I said: "Speaking for myself, it may be that a policy taken out by a creditor on the life of his debtor ought to be limited to the amount of the debt, with interest, and the amount of premiums, with interest thereon, during the expectancy of life, as shown by the Carlisle tables. This view, however, has never been adopted by this court in any adjudicated case, nor do we feel compelled to define the disproportion now, in view of the particular facts of the case in hand." In the subsequent case of *Cooper v. Shaeffer* (Pa. Sup.), 11 Atl. Rep. 548, our Brother Sterrett, after quoting the above, remarked: "This appears to be a just and practicable rule." No such rule was established, however, in *Cooper v. Shaeffer*. In that case there was an insurance of \$3,000 to cover a debt of \$100, and this court said, through Mr. Justice Sterrett: "In view of the undisputed facts, the learned judge of the common pleas held that the disproportion between the insurance of \$3,000 and the debt of \$100 was so great as to require him to say, as matter of law, that the transaction was a wager, and that the assignors of the policy had no right to retain more of the insurance money recovered by them than the amount of the debt, plus the premiums paid and

interest thereon. In this he was clearly right. The disproportion is so great as to make the insurance a palpable wager, and no court should hesitate to declare it so as matter of law." We have no doubt that, in a proper case, where the facts are not disputed, it is the duty of the court to pronounce upon the character of the policy. Thus, in *Grant's Adm'rs v. Kline*, supra, it was said: "To take out a policy of \$5,000 to secure a debt of five dollars would be such a palpable wager that no court would hesitate to declare it so as matter of law." It is true this remark was made by way of illustration, and we only refer to it for that purpose now. *Cooper v. Shaeffer* decided nothing but that particular litigation. It laid down no rule for the future beyond its own particular facts, viz., that an insurance of \$3,000 for a debt of \$100, unexplained, was a gambling policy. It may be asked why it does not rule this case, where the amount of insurance was the same, and a difference of a few dollars only in the amount of the debt. The answer is not difficult. *Cooper v. Shaeffer* was decided upon the single ground of the disproportion between the insurance and the debt. There were no facts in evidence by which this disproportion could be explained or shown to be justifiable. This appears by the report of the case, as well as from the opinion of Judge Simonton, who tried that as well as this case below. In refusing a new trial in the case in hand, that learned and able judge said, in reference to *Cooper v. Shaeffer*: "Even the age of the insured was not dwelt upon as an element of the problem, and there was not a word of evidence as to the expectancy of life or the probable amount of annual payments to be made. Here, however, these important matters were urged as a principal ground of defense, and required consideration. In our opinion, they necessarily carried the case to the jury, and abundantly justified the verdict. The defendants insured a healthy man of 42 years in the sum of \$3,000, to protect a debt of \$100. If he had merely lived out his expectancy, and no longer, they would have been obliged to pay for assessments and annual dues \$2,436.32, to which, if interest be added, the amount of their investment would have been \$4,336.31. In return they would have received \$3,000, thus suffering a considerable loss. Surely, to call such a transaction 'speculation' is to misuse the word. That it happened to be profitable, because the insured died within a few years, is manifestly not to the point." I have

quoted this extract at length, because I could in no better way emphasize the distinction between *Cooper v. Shaeffer* and the case in hand.

The law very properly lays a mailed hand upon speculative life insurance. Of all the forms of gambling, it is one of the most objectionable. The records of our own court show that it sometimes leads to murder. The holder of a policy upon a life in which he has no interest, either of a social or pecuniary nature, has a strong interest in the death of the assured. This interest grows and strengthens with each payment of premium. He has made a bid upon the life of another person. A man who will engage in such a transaction cannot safely be regarded as a saint. He sees with growing impatience that life prolonged from year to year, and his money slipping away in premiums. A man thus situated soon becomes familiar with the thought of the death of the person who stands between him and what, in his morbid fancy, he may regard as his rights. That crime follows in some instances is a fact of which we have judicial knowledge. All life insurance is in one sense speculative, yet within proper restrictions it has been found to be highly beneficent, and not in conflict with public policy. It enables a man in the days of his early struggles to provide for his family in case of his death. It renders it possible for a business man to borrow the capital needed for success. It furnishes the means, and the only means, by which a creditor may sometimes secure a doubtful claim. Yet in all these cases there is the element of speculation, for, if the assured dies shortly after the policy is issued, the beneficiary, whether he be a blood relation or a creditor, gets a sum of money greatly disproportioned to the amount paid. But in these cases the law does not regard the speculative element as one of danger. It is true that a son who takes out a policy on the life of his father, or a creditor upon the life of his debtor, may have an interest in the death of the assured, and resort to crime to procure it; but experience shows that such instances are extremely rare, and the temptation no greater than in thousands of other instances in which one person may be benefited pecuniarily by the death of another. But a policy taken out by one who has no interest, either as a creditor or a relative, in the life of the assured, is always a danger signal.

It is settled law that a creditor has an insurable interest in the life of his debtor, but up to this time there is no decision as to the limit of this right. Our own cases furnish us no settled rule, and for this reason I do not think it necessary to review them. Each case has been decided upon its own facts. In *Cooper v. Shaeffer*, as before observed, it was said the insurance was too large. In *Grant's Adm'rs v. Kline*, on the other hand, we held that the amount of insurance was not disproportioned to the debt. We have now reached a point where it is necessary to lay down some fixed rule by which such cases can be disposed of in the future; otherwise the rulings of the courts and the verdicts of juries upon such questions will be arbitrary; and where there is nothing in a case but the amount of the insurance and the amount of the debt it is impossible for either a court or a jury to arrive at a correct result. Starting out with the conceded proposition that a creditor has an insurable interest in the life of his debtor, and may lawfully take out a policy thereon, it follows logically that he may take out the policy in such a sum as may reasonably secure the debt. It needs no argument to show that, if my debtor owes me \$1,000, a policy for \$1,000 would be inadequate; for, if my debtor dies within 24 hours after the policy is taken out, I am a loser by the amount of the premium paid, and it would be but a few years before the interest on the debt and the premiums would exceed the debt. Every future payment then would be a loss, with the only alternative of adding to this loss year by year, or abandoning the policy altogether, and sinking the whole amount paid. It seems clear, upon reason, that the creditor may take out a policy in excess of his debt. But to what excess? The answer to this question obviously depends upon circumstances. An important element in the consideration of this question is the age of the assured. The difference between a policy on the life of a man 25 years of age and one of 75 is clear to the dullest understanding. The assured was only 42 years of age, and his expectancy of life was 26 years. The chances were greatly in favor of his living out his expectancy. The Carlisle tables were prepared with care, by competent experts, and are the result of actual experience. I am therefore justified in saying that the chances were in favor of the assured living out his expectancy, in which case there would be the loss of interest on the debt for 26 years added to the dues

and assessments, with interest thereon, for the same period. The evidence shows that in such event the defendants would have been losers by a considerable sum. In fact, I infer from the tables furnished that after about 17 years the defendants would have carried this policy at a loss. The defendants assumed this risk when they took out the policy. They also had the chance of the assured not living out his expectancy. This is a risk which an insurance company assumes upon every policy which it issues. In a particular instance the assured may live many years beyond his expectancy, which is a large gain to the company; but this gain is equalized by the loss in instances where the assured dies before the expiration of his expectancy, so that in the vast volume of business of such corporations the average result is reasonably uniform. But the holder of a single policy can have no average result. He takes the risk, with the chances fairly balanced. Had these defendants taken out 100 policies on the lives of as many debtors, it is more than probable that some of them would have largely exceeded their expectation, while others would not have reached it. In such case there would not have been material gain or loss. Had the assured lived out his expectancy of life, no question would probably have arisen as to the right of the defendants to retain the whole of the money. It could not, then, have been successfully assailed as a gambling transaction. I submit that the character of the contract cannot depend upon results or the accident of death. If not lawful in its inception, it could never become so.

In order to ascertain whether an insurance is disproportioned to the debt, regard must be had to the age of the assured, his expectation of life, and the cost of carrying the insurance, with interest thereon, as well as upon the amount of the debt. The evidence which forms the subject of the first assignment was not only proper, but essential, to an intelligent understanding of the case. It is just what was lacking in *Grant's Adm'rs v. Kline*, and was one of the reasons why we avoided deciding the broad question in that case. But any one who reads that opinion between the lines can see that the judicial mind must have been influenced to some extent by the suggestion in reference to the Carlisle tables. The rule we now announce may not be the best, but we have not been able to find a better, after a most careful and anxious consideration of the question. That it will not pro-

duce exact justice in all cases is possible. There will always be cases of individual hardship in the application of all general rules. No general rule can be made to fit each particular case; otherwise it would cease to be a rule. My attention was especially called to this difficulty by the following extract from the opinion of the learned judge below in refusing a new trial: "With much respect, it is suggested that the principle indicated in *Grant's Adm'rs v. Kline*, 115 Pa. St. 625, 9 Atl. Rep. 150, and *Cooper v. Shaeffer*, *supra*, as the proper rule to determine for what sum a creditor's policy should be taken out, ought to be somewhat expanded before it is positively adopted. As now stated, it would not provide for a case like this, where the policy is taken out in a company which levies annual [monthly?] assessments, and where, therefore, allowance must be made in the creditor's forecast for possible fluctuations. Neither would it now provide for the not infrequent contingency of the insured outliving his expectancy. Under the present form of the indicated rule, the creditor must always lose if the debtor lives beyond his expectancy; and it cannot be accurately applied to assessment insurance, because in this variety of the business the annual payments are not a previously known and certain sum."

We have no difficulty in disposing of the objection that the rule does not provide for the case of the assured living beyond his expectancy, and thus entailing a loss upon the creditor. If we go beyond the expectancy, where are we to stop? A man may live to the age of a hundred, and such length of days is of frequent occurrence. To sanction a policy covering such a period, and yet to allow the holder to recover the full amount in case of death within a year, would be a retrograde step in our decisions. Under such a system, the creditor would be absolutely secure, with the possibility of an enormous gain in case of an early death; whereas at present, as I have endeavored to show, the risk of a debtor's exceeding his expectancy is equalized by the possibility of his death within it, and in a given number of cases the result produces uniformity. The want of uniformity is not the fault of the rule, but of its application to a single case.

There is more difficulty in the other objection. The policy in question, however, was taken out in a mutual company, where assessments are made from time to time, and there appears to have been no difficulty upon the trial below in ascertaining with

sufficient accuracy the amount of assessments which the defendants would have been called upon to pay had the assured lived out his expectancy. The precise amount of such assessments cannot, of course, be estimated with the same accuracy as in the case of a company in which the annual premium is a fixed sum. But the assessments, even in a mutual company, can be approximated by the experience of other similar companies with sufficient accuracy to base an insurance upon it; and, where a policy has been taken out in good faith by a creditor, the law does not exact impossibilities. A slight mistake, one way or the other, owing to the condition of the company's business, by which assessments are increased or diminished, would not necessarily vitiate a policy. The cost of life insurance, by whatever system adopted, it is believed, does not vary so greatly as to prevent a reasonable approximation thereof. It may be that few men would take out a life policy to secure a debt of \$100, where there is an expectancy of life for 26 years, and pay an annual assessment or premium in excess of the whole amount of the debt. But we do not pass upon the wisdom of contracts. We only consider their legality, and care must be taken in the enforcement of an admittedly sound rule of public policy not to impinge upon the right of the citizen to contract. In this instance the contract was lawful, and the defendants appear to have entered into it, not so much for their own benefit as for the accommodation of the assured. We are not to measure its legality by its results, but by its surroundings at the time it was made. We are of opinion that a creditor may lawfully take out a policy on the life of his debtor in an amount to cover the debt, with interest, and the cost of such insurance, with interest thereon, during the period of the expectancy of life of the assured, according to the Carlisle tables. * * *

Time When Interest Must Exist.

CONNECTICUT MUT. L. INS. CO. v. SCHAEFER.

Supreme Court of the United States, 1876. 94 U. S. 457.

[A husband and wife effected insurance upon their joint lives, payable to the survivor upon the death of either. They were subsequently divorced. The plaintiff, the wife, paid the premiums

until the death of the husband, and then brought this suit on the policy.]

BRADLEY, J., delivered the opinion of the court. * * * The policy in question might, in our opinion, be sustained as a joint insurance, without reference to any other interest, or to the question whether the cessation of interest avoids a policy good at its inception. We do not hesitate to say, however, that a policy taken out in good faith, and valid at its inception, is not avoided by the cessation of the insured's interest, unless such be the necessary effect of the provisions of the policy itself. Of course, a colorable or merely temporary interest would present circumstances from which want of good faith and an intent to evade the rule might be inferred. And in cases where the insurance is effected merely by way of indemnity, as where a creditor insures the life of his debtor for the purpose of securing his debt, the amount of insurable interest is the amount of the debt.

But supposing a fair and proper insurable interest, of whatever kind, to exist at the time of taking out the policy, and that it be taken out in good faith, the object and purpose of the rule which condemns wager policies is sufficiently attained; and there is then no good reason why the contract should not be carried out according to its terms. This is more manifest where the consideration is liquidated by a single premium paid in advance than where it is distributed in annual payments during the insured life. But, in any case, it would be very difficult, after the policy had continued for any considerable time, for the courts, without the aid of legislation, to attempt an adjustment of equities arising from a cessation of interest in the insured life. A right to receive the equitable value of the policy would probably come as near to a proper adjustment as any that could be devised. But if the parties themselves do not provide for the contingency, the courts cannot do it for them. * * *

CHAPTER III.

CONCEALMENT, REPRESENTATIONS AND WARRANTIES.

PHOENIX MUT. LIFE INS. CO. v. RADDIN.

Supreme Court of the United States, 1887. 120 U. S. 183.

GRAY, J. This was an action brought by Sewell Raddin, and prosecuted by his administrator, upon a policy of life insurance dated April 25, 1872. * * *

The application was signed by Sewell Raddin, both for his son and for himself, and contained 29 printed "questions to be answered by the person whose life is proposed to be insured, and which form the basis of the contract," three of which, with the written answers to them, and the concluding paragraph of the application, were as follows:

"(10) Is the party addicted to the habitual use of spirituous liquors or opium?" Ans. No.

"(28) Has any application been made to this or any other company for insurance on the life of the party? If so, with what result? What amounts are now assured on the life of the party, and in what companies? If already assured in this company, state the No. of policy." Ans. \$10,000, Equitable Life Assurance Society.

"(29) Is the party and the applicant aware that any untrue or fraudulent answers to the above queries, or any suppression of facts in regard to the health, habits, or circumstances of the party to be assured, will vitiate the policy, and forfeit all payments thereon?" Ans. Yes. * * *

The rules of law which govern the decision of this question are well settled, and the only difficulty is in applying those rules to the facts before us. Answers to questions propounded by the insurers in an application for insurance, unless they are clearly shown by the form of the contract to have been intended by both parties to be warranties, to be strictly and lit-

erally complied with, are to be construed as representations, as to which substantial truth in everything material to the risk is all that is required of the applicant. *Moulor v. American Ins. Co.*, 111 U. S. 335; S. C. 4 Sup. Ct. Rep. 466; *Campbell v. New England Ins. Co.*, 98 Mass. 381; *Thomson v. Weems*, 9 App. Cas. 671.

The misrepresentation or concealment by the assured of any material fact entitles the insurers to avoid the policy. But the parties may by their contract make material a fact that would otherwise be immaterial, or make immaterial a fact that would otherwise be material. Whether there is other insurance on the same subject, and whether such insurance has been applied for and refused, are material facts, at least when statements regarding them are required by the insurers as part of the basis of the contract. *Carpenter v. Providence Washington Ins. Co.*, 16 Pet. 495; *Jeffries v. Life Ins Co.*, 22 Wall. 47; *Anderson v. Fitzgerald*, 4 H. L. Cas. 484; *Macdonald v. Law Union Ins. Co.*, L. R. 9 Q. B. 328; *Edington v. Ætna Life Ins. Co.*, 77 N. Y. 564; S. C. 100 N. Y. 536, and 3 N. E. Rep. 315.

Where an answer of the applicant to a direct question of the insurers purports to be a complete answer to the question, any substantial misstatement or omission in the answer avoids a policy issued on the faith of the application. *Cazenove v. British Equitable Assurance Co.*, 29 Law J. C. P. (N. S.) 160, affirming S. C. 6 C. B. (N. S.) 437. But where upon the face of the application, a question appears to be not answered at all, or to be imperfectly answered, and the insurers issue a policy without further inquiry, they waive the want or imperfection in the answer, and render the omission to answer more fully, immaterial. *Connecticut Ins. Co. v. Luchs*, 108 U. S. 498; S. C. 2 Sup. Ct. Rep. 949; *Hall v. People's Ins. Co.*, 6 Gray, 185; *Lorillard Ins. Co. v. McCulloch*, 21 Ohio St. 176; *American Ins. Co. v. Mahone*, 56 Miss. 180; *Carson v. Jersey City Ins. Co.*, 43 N. J. Law, 300; S. C. 44 N. J. Law, 210; *Lebanon Ins. Co. v. Kepler*, 106 Pa. St. 28.

The distinction between an answer apparently complete, but in fact incomplete, and therefore untrue, and an answer manifestly incomplete, and as such accepted by the insurers, may be illustrated by two cases of fire insurance, which are governed by the same rules in this respect as cases of life insurance. If one

applying for insurance upon a building against fire is asked whether the property is incumbered, and for what amount, and in his answer discloses one mortgage, when in fact there are two, the policy issued thereon is avoided. *Towne v. Fitchburg Ins. Co.*, 7 Allen, 51. But if to the same question he merely answers that the property is incumbered, without stating the amount of incumbrances, the issue of the policy without further inquiry is a waiver of the omission to state the amount. *Nichols v. Fayette Ins. Co.*, 1 Allen, 63. * * *

The twenty-eighth printed question in the application consists of four successive interrogatories, as follows: "Has any application been made to this or any other company for assurance on the life of the party? If so, with what result? What amounts are now assured on the life of the party, and in what companies? If already assured in this company, state the No. of policy." The only answer written opposite this question is "\$10,000, Equitable Life Assurance Society." The question being printed in very small type, the answer is written in a single line midway of the opposite space, evidently in order to prevent the ends of the letters from extending above or below that space; and its position with regard to that space, and to the several interrogatories combined in the question, does not appear to us to have any bearing upon the construction and effect of the answer. But the four interrogatories grouped together in one question, and all relating to the subject of other insurance, would naturally be understood as all tending to one object,—the ascertaining of the amount of such insurance. The answer in its form is responsive, not to the first and second interrogatories, but to the third interrogatory only, and fully and truly answers that interrogatory by stating the existing amount of prior insurance, and in what company, and thus renders the fourth interrogatory irrelevant. If the insurers, after being thus truly and fully informed of the amount and the place of prior insurance, considered it material to know whether any unsuccessful applications had been made for additional insurance, they should either have repeated the first two interrogatories, or have put further questions. The legal effect of issuing a policy upon the answer as it stood was to waive their right of requiring further answers as to the particulars mentioned in the twenty-eighth question, to determine that it was immaterial, for the purposes of their contract, whether any

unsuccessful applications had been made, and to estop them to set up the omission to disclose such applications as a ground for avoiding the policy. The insurers, having thus conclusively elected to treat that omission as immaterial, could not afterwards make it material by proving that it was intentional. * * *

The expression at the beginning of the policy, that the insurance is made "in consideration of the representations made in the application for this policy," and of certain sums paid and to be paid for premiums, does not make those representations part of the consideration, in the technical sense, or render it necessary or proper to plead them as such.

Judgment affirmed.

CHAPTER IV.

SUBROGATION.

Nature of the Right of the Insured Against the Third Party.

MICHAEL v. PRUSSIAN NAT. INS. CO.

Court of Appeals of New York, 1902. 171 N. Y. 25, 63 N. E. 810.

[Action on an insurance policy, insuring the use and occupancy of a grain elevator. The insured had entered into a pooling arrangement with other elevator companies, by the terms of which, notwithstanding the destruction of his elevator by fire, he should receive a certain percentage of a common fund into which a considerable portion of the earnings of the elevator were placed. The insurer appealed from a judgment in favor of the insured.]

GRAY, J. * * * The appellant's claim to be entitled, by application of the equitable doctrine of subrogation, to be credited with a proportionate share of the percentages or moneys received by the plaintiff from the association, in reduction of its liability upon the policy, is not a tenable one. This claim, obviously, again assumes that the subject of insurance was the earnings and income of the elevator plant. It is not that, and therefore the appellant is not concerned with the arrangement made by the assured with respect to their disposition. The Western Elevating Association might, conceivably, with better appearance of right, prefer the claim to be subrogated as to the insurance moneys, in order to recoup itself for the moneys paid over to its disabled member; but how the appellant can be heard to claim the application of the doctrine of subrogation it is difficult to perceive. It has certainly not paid the loss, and the loss was not one which was to be made good, as such, by the association. During the season of navigation percentages were earned in a general fund, created by "pooling" the common earnings, and they were to be paid over under all conditions, and notwithstanding that the elevator might be destroyed, and the general fund diminished in consequence. I think the principle of the decision of *Foley v.*

Insurance Co., 152 N. Y. 131, 46 N. E. 318, 43 L. R. A. 664, relied upon at the appellate division as to this point, is applicable. There the policy was upon some dwelling houses in course of construction, and they were destroyed by fire. The contractors for their erection were obligated to complete them before becoming entitled to be paid for the materials and work. It was held that the insurance company was not concerned with the contract relations between the plaintiff and the contractors. It was said that: "It is possible that, if the defendant is compelled to pay the policy, the plaintiffs may, if they insist upon their rights against the contractors, get double compensation, unless they should be adjudged to hold the fund recovered for the contractors. But, however that may be, the owners had an insurable interest in the whole value of the buildings on their land, and the defendant neither can compel the plaintiffs to put the loss on the contractors, nor can they resort to the terms of the building contract to diminish the liability for an actual loss within the terms of the policy." Again, it was observed that, though the owner "may recoup his losses by reason of a contract liability of a third person, [it] in no way affects the liability of an insurer, in the absence of an exemption in the policy." The case is very much in point as an authority for the disposition of this appeal. The theory of the right of subrogation rests upon the fact that the assured has a claim against a third party for the loss which has been sustained in the destruction of the property insured. That is not the case with the plaintiff, who did not receive his payment from the "pooling" fund because or in consideration of the loss, but under an arrangement which had secured to members of the association certain percentages, under all conditions, as a consideration of entering into it. * * *

Nature of the Insured's Right Against the Insurer.

UNITED STATES v. AMERICAN TOBACCO CO.

Supreme Court of the United States, 1897. 166 U. S. 468.

Appeal from Court of Claims.

This action was brought in the Court of Claims for the purpose of recovering the value of certain internal revenue stamps alleged to have been destroyed by fire before they had been used.

On the 27th of May, 1895, the American Tobacco Company

filed its petition in the Court of Claims, in its own name, for the use of certain insurance companies named in the petition, to recover the value of the stamps destroyed by fire in its factory. The facts as to the loss and destruction of the stamps were set forth, and judgment asked for the value thereof. The usual general denial of all the allegations of the petition was filed by the attorney general on behalf of the United States, and the case went to trial, and after the evidence had been submitted the court found the following facts: That the tobacco company was a manufacturer of tobacco, occupying a building in New York City, which was established solely as a manufactory; no sales of tobacco being made at the factory; the shipments therefrom being made in bulk after the tobacco had been stamped according to law. On the 2d of April, 1893, the factory and its entire contents were destroyed by fire. Among those contents were internal revenue stamps of the United States of the face value of \$4,100.10. These stamps had been purchased by the company from the United States collector of internal revenue for use in the factory. Some of the stamps were unattached to packages of tobacco, and had never been used, and they were of the face value of \$1,356.63. The balance of the stamps, of the face value of \$2,743.47, had been attached to packages of tobacco which had not been sold or offered for sale, or removed from the factory for sale. The tobacco company had purchased and paid for these stamps, which were totally destroyed, and there were no unsettled claims against the company on behalf of the United States.

* * * * *

The contents of said factory were insured to the American Tobacco Company, by the insurance companies for whose use this suit is brought, in the full sum of \$139,500. The total loss by fire, as adjusted and settled with said claimant, was \$78,635.47, which sum said companies have paid to the American Tobacco Company in proportions as the face of their several policies bears to the whole sum insured. The face value of said United States internal revenue stamps destroyed as aforesaid, namely, \$4,100.10, was a part of the sum so paid by said insurance companies.

PECKHAM, J., after stating the facts, delivered the opinion of the court.

Three assignments of errors alleged to have been made by the court below have been filed on the part of the government, as follows:

“(1) In holding that the use appellees had an equitable claim against the appellant, which could be enforced by a suit in the name of the nominal appellee.” * * *

It is argued upon the part of the government that, as the insurance companies have paid the tobacco company in full for the value of the stamps destroyed by fire, they have thereby become the actual plaintiffs in this suit, and as the connection of the tobacco company is merely nominal, the case must therefore be decided as one between the United States and the insurance companies. Dealing with the companies in that light, it is further urged that their right to sue is based upon the ground that they are subrogated to the rights of the tobacco company, and consequently, if there be no right of subrogation, there is no right of recovery; there is no right of subrogation, because there was no insurable interest in the stamps on the part of the tobacco company; and there was no insurable interest, because the tobacco company could obtain from the government either other stamps in lieu of the stamps destroyed, or the amount or value thereof, upon giving satisfactory evidence of the necessary facts to the commissioner of internal revenue, and therefore the tobacco company was not liable to suffer any loss, and, as a consequence, had no insurable interest in the stamps.

The argument, as we think, is not well founded. The case is not to be treated or decided as one between the United States and the insurance companies. On the contrary, the rights of the companies, as between them and the government, are not the subject-matter of the suit. The insurance companies, as such, have no right of action against the government. It is the right of the claimant, the tobacco company, which is to be passed upon; and, unless that company has a legal cause of complaint, no recovery can be had in this suit. The companies must recover in the name of the tobacco company, and by reason of its rights. *Hall v. Railroad Co.*, 13 Wall. 367, 372, and cases cited.

The suit is properly brought in the name of the insured for the use of the insurers, but the cause of action rests on the rights of the owner. *Id.*; *Phoenix Ins. Co. v. Erie & W. Transp. Co.*, 117 U. S. 312, 321, 6 Sup. Ct. 750, 1176, and cases cited.

Payment to the owner by the insurer does not bar the right against another party originally liable for the loss, but the owner, by recovering payment of the underwriters, becomes trustee for them, and by necessary implication makes an equitable assignment to them of his right to recover in his name. *Insurance Co. v. Boshier*, 39 Me. 253, 255.

The question then arises as to what right, if any, the tobacco company has under the statute above cited, when it appears that the company has received payment from the insurance companies for the value of the stamps destroyed. Is that fact a bar to its right to claim payment under that section in a case where the recovery is sought for the purpose of reimbursing the insurance companies for the payment made by them, to the extent of the value of the stamps?

We think, upon the facts found by the court of claims, the action can be maintained, and the payment by the insurance companies constitutes no bar. * * *

CASTELLAIN v. PRESTON.

Court of Appeal, 1883. L. R. 11 Q. B. D. 380 (Eng.).

The following statement of the facts in this case appears in the opinion of Lord Justice Cotton:

In this case the appellant's company insured a house belonging to the defendants, and before there was any loss by fire the defendants sold the house to certain purchasers. Afterwards there was a fire, and an agreed sum was paid by the insurance office to the defendants in respect to the loss. The appellant apparently seeks to recover the sum which the office paid to the defendants, and if the plaintiff's claim could be shaped only in this form, I think my opinion would be against him. The plaintiff's claim may be treated in substance in another way—namely, the company seek to obtain the benefit, either wholly or partly, of the amount paid by them out of the purchase money which the defendants have received since the fire from the purchasers. In my opinion, the plaintiff is right in that contention.

BRETT, L. J. * * * I have mentioned the doctrine of notice of abandonment for the purpose of coming to the doctrine of subrogation. That doctrine does not arise upon any of the

terms of the contract of insurance; it is only another proposition which has been adopted for the purpose of carrying out the fundamental rule which I have mentioned, and it is a doctrine in favor of the underwriters or insurers, in order to prevent the assured from recovering more than a full indemnity; it has been adopted solely for that reason. It is not, to my mind, a doctrine as applied to insurance law on the ground that underwriters are sureties. Underwriters are not always sureties. They have rights which sometimes are similar to the rights of sureties, but that again is in order to prevent the assured from recovering from them more than a full indemnity. But it being admitted that the doctrine of subrogation is to be applied merely for the purpose of preventing the assured from obtaining more than a full indemnity, the question is, whether that doctrine as applied in insurance law can be in any way limited. Is it to be limited to this, that the underwriter is subrogated into the place of the assured so far as to enable the underwriter to enforce a contract, or to enforce a right of action? Why is it to be limited to that, if when it is limited to that, it will in certain cases enable the assured to recover more than a full indemnity? The moment it can be shown that such a limitation of the doctrine would have that effect, then, as I said before, in my opinion, it is contrary to the foundation of the law as to insurance, and must be wrong. And, with the greatest deference to my Brother Chitty, it seems to me that that is the fault of his judgment. He has by his judgment limited this doctrine of subrogation to placing the insurer in the position of the assured only for the purpose of enforcing a right of action, to which the assured may be entitled. In order to apply the doctrine of subrogation, it seems to me that the full and absolute meaning of the word must be used; that is to say, the insurer must be placed in the position of the assured. Now, it seems to me, that in order to carry out the fundamental rule of insurance law, this doctrine of subrogation must be carried to the extent which I am now about to endeavor to express—namely, that as between the underwriter and the assured the underwriter is entitled to the advantage of every right of the assured, whether such right consists in contract, fulfilled or unfulfilled, or in remedy for tort capable of being insisted on or already insisted on, or in any other right, whether by way of condition or otherwise, legal or equitable, which can be or has been exercised or has

accrued, and whether such right could or could not be enforced by the insurer in the name of the assured, by the exercise or acquiring of which right or condition the loss against which the assured is insured, can be or has been diminished. That seems to me to put this doctrine of subrogation in the largest possible form, and if in that form, large as it is, it is short of fulfilling that which is the fundamental condition, I must have omitted to state something which ought to have been stated. But it will be observed that I use the words "of every right of the assured." I think that the rule does require that limit. * * * The contract in the present case, as it seems to me, does enable the assured to be put by the third party into as good a position as if the fire had not happened, and that result arises from this contract alone. Therefore, according to the true principles of insurance law, and in order to carry out the fundamental doctrine—namely, that the assured can recover a full indemnity, but shall never recover more, except, perhaps, in the case of the suing and laboring clause under certain circumstances—it is necessary that the plaintiff in this case should succeed. The case of *Darrell v. Tibbits*, 5 Q. B. D. 560, has cut away every technicality which would prevent a sound decision. The doctrine of subrogation must be carried out to the full extent, and carried out in this case by enabling the plaintiff to recover. * * *

RAYNER v. PRESTON.

Supreme Court of Judicature, 1881. L. R. 18 Ch. D. 1
(Eng.).

The following statement of facts is taken from the opinion of Lord Justice Cotton:

The plaintiffs purchased from the defendants a messuage and workshops. Between the date of the contract and the time fixed for completion, the buildings purchased were injured by fire. The vendors had before the contract insured the buildings against fire, but there was not in the contract any mention of this fact or of the policy. The plaintiffs brought an action to establish their right to a sum received by the vendors from the insurance office, or to have it applied in or towards reinstating the buildings injured. The Master of the Rolls decided against their claim, and from this decision the plaintiffs appealed.

BRETT, L. J. * * * It seems to me that the question raised between the plaintiffs and the defendants calls upon us to consider, first of all, the nature of a policy of fire insurance; and, secondly, what was the relation with regard to the policy and to the property between the plaintiffs and the defendants in this case. Now, in my judgment, the subject-matter of the contract of insurance is money, and money only. The subject-matter of insurance is a different thing from the subject-matter of the contract of insurance. The subject-matter of insurance may be a house or other premises in a fire policy, or may be a ship or goods in a marine policy. These are the subject-matter of insurance, but the subject-matter of the contract is money, and money only. The only result of the policy, if an accident which is within the insurance happens, is a payment of money. It is true that, under certain circumstances, in a fire policy there may be an option to spend the money in rebuilding the premises; but that does not alter the fact that the only liability of the insurance company is to pay money. The contract, therefore, is a contract with regard to the payment of money, and it is a contract made between two persons, and two persons only, as a contract.

In this case there was a contract of insurance made between the defendants and the insurance company. That contract was made by the defendants, not on behalf of any undisclosed principal, not on behalf of anyone interested other than themselves. The contract was made by the defendants solely and entirely on their own behalf, and at a time when they had no relation of any kind with the plaintiffs. It was a personal contract between the defendants and the insurance office, to which they were the sole parties. It is true that under certain circumstances a policy of insurance may, in equity, be assigned so as to give another person a right to sue upon it; but in this case the policy of insurance, as a contract, never was assigned by the defendants to the plaintiffs. It would have been assigned by the defendants to the plaintiffs if it had been included in the contract of purchase, but it was not. Any valuation of the policy, any consideration of increase of the price of the premises in consequence of there being a policy, was wholly omitted. There was nothing given by the plaintiffs to the defendants for the contract. The contract, therefore, neither expressly nor impliedly, was assigned to the plaintiffs; and, so

far as regards the contract of insurance, there never was any relation of any kind between the plaintiffs and the defendants.

But there did exist a relation between the plaintiffs and the defendants, not with regard to the subject-matter of the contract, but with regard to the subject-matter of the insurance. There was a contract of purchase and sale between the plaintiffs and the defendants in respect of the premises insured. It becomes necessary to consider accurately, as it seems to me, and to state in accurate terms, what is the relation between the two people who have contracted together with regard to premises in a contract of sale and purchase. With the greatest deference, it seems wrong to say that the one is a trustee for the other. The contract is one which a court of equity will enforce by means of a decree for specific performance. But if the vendor were a trustee of the property for the vendee, it would seem to me to follow that all the product, all the value of the property received by the vendor from the time of the making of the contract ought, under all circumstances, to belong to the vendee. What is the relation between them, and what is the result of the contract? Whether there shall ever be a conveyance depends on two conditions: first of all, whether the title is made out, and, secondly, whether the money is ready; and unless those two things coincide at the time when the contract ought to be completed, then the contract never will be completed and the property never will be conveyed. But suppose at the time when the contract should be completed, the title should be made out and the money is ready, then the conveyance takes place. Now, it has been suggested that when that takes place, or when a court of equity decrees specific performance of the contract, and the conveyance is made in pursuance of that decree, then by relation back the vendor has been trustee for the vendee from the time of the making of the contract. But, again, with deference, it appears to me that if that were so, then the vendor would in all cases be trustee for the vendee of all the rents which have accrued due and which have been received by the vendor between the time of the making of the contract and the time of completion; but it seems to me that that is not the law. Therefore, I venture to say that I doubt whether it is a true description of the relation between the parties to say that from the time of the making of the contract, or at any time, one is ever trustee for the other. They are only parties to a

contract of sale and purchase of which a court of equity will under certain circumstances decree a specific performance. But even if the vendor was a trustee for the vendee, it does not seem to me at all to follow that anything under the contract of insurance would pass. As I have said, the contract of insurance is a mere personal contract for the payment of money. It is not a contract which runs with the land. If it were, there ought to be a decree that upon the completion of the purchase the policy be handed over. But that is not the law. The contract of insurance does not run with the land; it is a mere personal contract, and unless it is assigned no suit or action can be maintained upon it except between the original parties to it.

I therefore, with deference, think that the plaintiffs here cannot recover from the defendants, on the ground that there was no relation of any kind or sort between the plaintiffs and the defendants with regard to the policy, and therefore none with regard to any money received under the policy. * * *

HALL & LONG v. THE RAILROAD COMPANIES.

Supreme Court of the United States, 1871. 13 Wall. 367.

Hall & Long allowed this suit in their names, for the use of certain insurance companies, against the Nashville and Chattanooga Railroad Company, to recover the value of cotton shipped by them on the road of the defendant as a common carrier, which was accidentally consumed by fire, while being transported, and "became and was a total loss." The cotton had been insured by Hall & Long against loss by fire, in the companies for whose use the suit was brought, and these companies had paid the amount insured by them, respectively.

STRONG, J., delivered the opinion of the court. * * * It had been argued, however, that these decisions rest upon the doctrine that a wrongdoer is to be punished; that the defendants against whom such actions have been maintained were wrongdoers; but that, in the present case, the fire by which the insured goods were destroyed was accidental, without fault of the defendants, and, therefore, that they stood, in relation to the owner, at most in the position of double insurers. The argument will not bear examination. A carrier is not an insurer, though

often loosely so called. The extent of his responsibility may be equal to that of an insurer, and even greater, but its nature is not the same. His contract is not one for indemnity, independent of the care and custody of the goods. He is not entitled to a cession of the remains of the property, or to have the loss adjusted on principles peculiar to the contract of insurance; and when a loss occurs, unless caused by the act of God, or of a public enemy, he is always in fault. The law raises against him a conclusive presumption of misconduct, or breach of duty, in relation to every loss not caused by excepted perils. Even if innocent in fact, he has consented by his contract to be dealt with as if he were not so. He does not stand, therefore, on the same footing with that of an insurer who may have entered into his contract of indemnity, relying upon the carrier's vigilance and responsibility. In all cases, when liable at all, it is because he is proved, or presumed to be, the author of the loss. There is nothing, then, to take the case in hand out of the general rule, that an underwriter, who has paid a loss, is entitled to recover what he has paid by a suit in the name of the assured against a carrier who caused the loss.

When Does the Right Accrue?

PHOENIX INS. CO. v. FIRST NAT. BANK.

Supreme Court of Appeals of Virginia, 1889. 85 Va. 765,
8 S. E. 719.

RICHARDSON, J. This is an appeal from a decree of the circuit court of Rockingham county, rendered June 30, 1887, in the chancery cause therein pending in which the Phoenix Insurance Company of New York, the Fire Association of Philadelphia, and the Hope Insurance Company of New Orleans were complainants, and the First National Bank of Harrisonburg, Va., was defendant. A corporation styled the "New Rawley Springs Company" issued its bonds to the amount of \$30,000, dated July 12, 1879, with coupons for semi-annual interest, and executed a trust deed to secure payment thereof. These bonds, to the amount of \$7,187, were, on the 10th of August, 1885, owned by the defendant bank, and that day the bank obtained from the Phoenix Insurance Company a policy of insurance against loss by fire to

the amount of \$1,000, for the term of one year, in part of the buildings and furniture embraced in the trust deed. The policy was issued in the name of the Springs Company, though the bank paid the premium; the loss, if any, being payable to the bank, as its interest might appear. On the 7th of June, 1886, the items of property covered by the policy were destroyed by fire, the loss aggregating \$700, which was paid, and the policy surrendered. The bank also took out additional policies in the Virginia Fire & Marine Insurance Company for \$2,750, in the Hope Insurance Company of New Orleans for \$1,500, and in the Fire Association of Philadelphia for \$1,750, making a total insurance of \$7,000, to protect the bonds. The losses under the several policies were: Phoenix, \$700; Fire Association, \$1,375; Hope, \$1,050; and Virginia Fire & Marine, \$2,375,—aggregating \$5,500. When the Phoenix Insurance Company paid the bank the amount of the loss under its policy, it demanded of the bank \$700 of said bonds, claiming that it stood in the relation of surety; and that, having paid \$700 of the debt of the Springs Company represented by the bonds, it had become entitled, on the principle of subrogation, to bonds to that amount. This claim being denied by the bank, the Phoenix Insurance Company filed its bill for relief. The bank demurred to and answered the bill, denying the complainant's demand. Then the Fire Association and the Hope Insurance Company, by leave of the court, filed their petition to the same effect. These two companies had not paid the losses under their policies, declining to do so until the bonds they claimed were turned over to them. In vacation, on the 30th of June, 1887, the court decreed that the complainants were not entitled to demand and take of the bank the bonds, or any of them, until the bank had received the full amount of the principal and interest of its debt; but that the insurance companies which have or shall have paid the bank the amount of adjusted loss due from them, respectively, were entitled in equitable proportions to such surplus of the dividends applicable to said bonds owned by the bank as may arise upon the foreclosure of the trust deed, and remain after the payment of principal and interest of said bonds to the bank, and that the prayer of the complainants be denied, and that the right of the bank to hold and collect the bonds was firm and stable. From this decree the Phoenix Insurance Company and the other complainants appealed to this court.

We have had no hesitancy in coming to the conclusion that the decree complained of is without error, either on principle or authority. The case involves only one single question: Does an insurer, who has paid a loss to a mortgagee that covers only a part of the mortgage debt, acquire, as against the mortgagee, a right to demand and take from the mortgagee the evidences of the debt secured to the amount of the loss paid by the insurer, whether the mortgagee be able or not to obtain satisfaction of his debt from the remaining evidences of the debt? or, in other words, must not the creditor's debt be paid in full before the insurer can take from him, by subrogation, any part of that debt? The doctrine which is applicable to this case, and which squarely meets this question, is clearly laid down by Mr. Justice Story in pronouncing the opinion of the Supreme Court of the United States in *Carpenter v. Insurance Co.*, 16 Pet. 501, where the learned judge says: "No doubt can exist that the mortgagor and the mortgagee may each separately insure his own distinct interest in the property. But there is this important distinction between the cases, that, where the mortgagee insures solely on his own account, it is but an insurance of his debt, and, if his debt is afterwards paid or extinguished, the policy ceases from that time to have any operation, and, even if the premises insured are subsequently destroyed by fire, he has no right to recover for the loss, for he sustains no damage thereby; neither can the mortgagor take advantage of the policy, for he has no interest whatever therein. On the other hand, if the premises are destroyed by fire before any payment or extinguishment of the mortgage, the underwriters are bound to pay the amount of the debt to the mortgagee, if it does not exceed the insurance. But then, upon such payment, the underwriters are entitled to an assignment of the debt from the mortgagee, and may recover the same amount from the mortgagor, either at law or in equity, according to circumstances." And in *Insurance Co. v. Stinson*, 103 U. S. 25, Mr. Justice Bradley concludes the opinion with the remark: "After a loss has occurred, and the insurance has been paid sufficient to discharge the debt, the insurers may be entitled to be subrogated to the rights of the creditor against the debtor." In a note to *King v. Insurance Co.*, 54 Amer. Dec. 696, the learned annotator says: "The doctrine of the principal case, that the insurer is not entitled to demand such subrogation or assign-

ment under a policy, * * * which does not expressly provide for it, is the established law of Massachusetts, * * * and that doctrine seems to be adopted in *May, Ins. § 456*; *Wood, Ins. 782*; and in later editions of *Mr. Phillips' work (2 Phil. Ins. § 1712)*. But it must be admitted that the decided preponderance of authority is against this doctrine, and in favor of the insurer's right of subrogation and assignment in such cases upon paying the loss, and, if necessary, the balance due on the mortgage." Citing *Fland. Ins. 400*; *Carpenter v. Insurance Co., 16 Pet. 495*; and numerous other authorities. The authorities demonstrate the correctness of the decree appealed from, and we are therefore of opinion that the same must be affirmed.

Right as Affected by Acts of the Insured.

WAGER v. PROVIDENCE INS. CO.

Supreme Court of the United States, 1893. 150 U. S. 99.

[H. Morse & Co. shipped grain by common carrier and insured the grain in favor of "the owner, advancer or common carrier."]

SHIRAS, J., delivered the opinion of the court. * * *

It is contended that the insurance companies, having paid the loss to the owners of the cargo, are entitled to be subrogated to the rights of the assured against the carriers.

It is too well settled by the authorities to admit of question that, as between a common carrier of goods and an underwriter upon them, the liability to the owner for their loss or destruction is primarily upon the carrier, while the liability of the insurer is only secondary. The contract of the carrier may not be first in order of time, but it is first and principal in ultimate liability. In respect to the ownership of the goods, and the will incident thereto, the owner and the insurer are considered but one person, having together the beneficial right to the indemnity due from the carrier for a breach of his contract, or for nonperformance of his legal duty. Standing thus, as the insurer does, practically in the position of a surety, stipulating that the goods shall not be lost or injured in consequence of the peril insured against, whenever he has indemnified the owner for the loss he is entitled to all the means of indemnity which the satisfied owner held against the party primarily liable. His right rests upon familiar

principles of equity. It is the right of subrogation, dependent not at all upon privity of contract, but worked out through the right of the creditor or owner. Hence it has often been ruled that an insurer who has paid a loss may use the name of the assured in an action to obtain redress from the carrier whose failure of duty caused the loss. *Hall v. Railroad Co.*, 13 Wall. 369.

But it is equally well settled that the right, by way of subrogation, of an insurer, upon paying for a total loss of the goods insured, to recover over against the carrier, is only that right which the assured has, and that accordingly when a bill of lading provides that the carrier, when liable for the loss, shall have the full benefit of any insurance that may have been effected upon the goods, this provision is valid, as between the carrier and the shipper, and that therefore such provision limits the right of subrogation of the insurer, upon paying the shipper the loss, to recover over against the carrier. *Phoenix Ins. Co. v. Erie & W. Transp. Co.*, 117 U.S. 312, 6 Sup.Ct.Rep. 750, 1176; *St. Louis, I. M. & S. Ry. Co. v. Commercial Union Ins. Co.*, 139 U. S. 223, 11 Sup. Ct. Rep. 554.

If a valid claim by the underwriter to be subrogated to the rights of the owner will not arise where the carrier has contracted with the owner that he (the carrier) shall have the benefit of any insurance, it would seem to be clear that, where the carrier is actually and in terms the party insured, the underwriter can have no right to recover over against the carrier, even if the amount of the policy has been paid by the insurance company to the owner on the order of the carrier.

SOUTHARD v. MINNEAPOLIS, ST. P. & S. M. RY. CO.

Supreme Court of Minnesota, 1895. 60 Minn. 382, 62 N. W. 442.

[William B. Southard, the plaintiff, shipped goods by the defendant railroad and insured them. The goods were lost in transit. The insurer paid the plaintiff for the loss on condition that it, the insurer, should have the right to proceed against the carrier. Further facts appear in the following extract from the opinion of the court.]

COLLINS, J. * * * In the bills of lading—although not in the receipts, we notice—it was stipulated that in case of loss,

detriment, or damage to the flour while in transit the carrier liable for such loss, detriment, or damage should have the full benefit of any insurance which might have been effected on the same. In the policy of insurance issued to the consignor—some time prior to the delivery of the flour to the defendant—for the benefit of all parties concerned, was a condition “that, in case any agreement be made by the insured with any carrier by which such carrier stipulates to have, in case of any loss for which he may be liable, the benefit of this insurance, then, and in that event, the insurers shall be discharged of any liability for such loss hereunder”; so that, by reason of the stipulation in the bills of lading, the insurance company had been discharged and released from any liability on account of this loss. It had a complete defense to an action brought on the policy to recover for the value of the flour. The situation then was that the defendant had become primarily liable for the amount of the loss, while the insurance company had been released and absolved from liability under its policy. This is conceded by defendant’s counsel, but it is urged that the objection and defense were waived, and that the subsequent transactions between the owners of the flour and the insurance company amounted to an election on the part of the latter to make unconditional payment, and that, therefore, defendant is entitled to the benefit of the same by reason of the stipulation in the carriage contracts. We do not consider the transaction between the insurance company and the insured as indicating an intention on the part of the former to waive the condition of the policy, or as showing an election on its part to make unconditional payment. Such intent or election was expressly repelled by its acts. It absolutely refused to treat with the owners of the flour, except conditionally, and in a manner which would prevent an imputation to it of any such intent or election. But it is clear that the insurance company, absolved from payment as it was, and under no legal obligation to pay, had the right to exact such terms with respect to the party primarily liable to the insured as it chose as a condition of payment. *Inman v. Railway Co.*, 129 U. S. 128, 9 Sup. Ct. 249. This is no new proposition of law, and is distinctly recognized in one of the cases relied upon by defendant’s counsel. *Lancaster Mills v. Merchants’ Cotton Press Co.*, 89 Tenn. 1, 14 S. W. 317. So that, if we concede the transaction as amounting to payment, it was upon terms which

the insurer had a legal right to impose, that it should have the unqualified absolute right to proceed against the party primarily liable to the insured. It follows that defendant, primarily liable, is not in a situation to complain or to object or to demand that it have the benefit of the payment. * * *

Life Insurance.

CONNECTICUT MUTUAL LIFE INS. CO. v. NEW YORK AND NEW HAVEN RAILROAD CO.

Supreme Court of Connecticut, 1856. 25 Conn. 265.

STORRS, J. The defendants, a railroad company, are charged with having negligently occasioned the death of one Dr. Beach, by which event the plaintiffs, a life insurance company, have been compelled to pay to his representatives the amount of an insurance effected upon his life, of which amount a recovery is sought in this action. * * *

We decide that in the absence of any privity of contract between the plaintiffs and defendants, and of any direct obligation of the latter to the former growing out of the contract or relation between the insured and the defendants, the loss of the plaintiffs, although due to the acts of the railroad company, being brought home to the insurers only through the artificial relation of contractors with the party who was the immediate subject of the wrong done by the railroad company, was a remote and indirect consequence of the misconduct of the defendants, and not actionable. * * *

The cases in which insurers have been permitted to recover against the authors of their losses are not in contravention of these principles. They have recovered, not by color of their own legal right, but under a general doctrine of equity jurisprudence, commonly known as the doctrine of subrogation, applicable to all cases wherein a party who has indemnified another in pursuance of his obligation so to do succeeds to, and is entitled to a cession of, all the means of redress held by the party indemnified against the party who has occasioned the loss. In some instances the doctrine has been carried so far that an insurer has been permitted to recover from the insured such compensation as the

latter has subsequently obtained from the wrongdoer; as if the money paid by the tort-feasor, under such circumstances, was really paid for the use of the insurer. By virtue of this doctrine, there is no doubt of the right of an insurer, who has paid a loss, to use the name of the insured, in order to obtain redress from the author of the wrong; a right to be exercised for the benefit of the party equitably entitled to its benefits, not to be enforced by its possessor in his own name, but by him as the successor to the remedies of the person whom he has indemnified. Having no independent claim on the wrongdoer, he might be successfully met by the superior equities of the wrongdoer, such for instance as a payment to the party directly injured, without notice of the insurer's claim to be subrogated. Nothing can be plainer than that an indirect liability of this kind is an argument rather against a claim of a direct responsibility of the wrongdoer than a suggestion in its favor. The views taken by courts in recognizing the insurer's right of subrogation tend to sustain the principle which we now maintain.

CHAPTER V.

WAIVER AND ESTOPPEL.

Waiver and Estoppel Distinguished—Implied Waivers.

ORIENT INS. CO. v. McKNIGHT.

Supreme Court of Illinois, 1902. 197 Ill. 190, 64 N. E. 339.

CARTER, J. The appellee obtained a judgment against appellant on its policy insuring certain cribs of corn belonging to appellee from loss by fire. The judgment was affirmed by the appellate court, and the appellant company took this its further appeal.

Appellee had been engaged in shelling the corn with a steam cornsheller, and late at night, on or about September 14, 1899, the cribs took fire, and they and the corn in them were destroyed. The policy contained the following provisions: (1) That the entire policy should be void if the interest of the insured in the property be not truly stated therein; (2) that the entire policy should be void if the hazard be increased by any means within the control or knowledge of the insured; (3) that the entire policy should be void if the interest of the insured be other than unconditional and sole ownership; and (4) that "this policy is made and accepted subject to the foregoing stipulations and conditions, together with such other provisions, agreements, or conditions as may be indorsed hereon or added hereto; and no officer, agent, or other representative of this company shall have power to waive any provision or condition of this policy except such as by the terms of this policy may be the subject of agreement indorsed herein or added hereto, and as to such provisions and conditions no officer, agent, or representative shall have such power, or be deemed or held to have waived such provisions or conditions, unless such waiver, if any, shall be written upon or attached hereto; nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached."

The principal defense was that in shelling his corn with a steam sheller set near the cribs the hazard was increased by the insured, and that the policy thereby became void under the second condition of the policy above set out. While not conclusive, there was evidence to prove that the fire originated from the engine, and that the hazard was increased by shelling the corn in the manner adopted. But these were questions of fact which have been finally disposed of by the judgment of the appellate court, and, although appellant asked the court to instruct the jury to find for the defendant, we would not be authorized to say, as a matter of law, under all the evidence, that the hazard was increased and that the instruction should have been given. But, even if the hazard was increased in violation of said second provision of the policy, there was sufficient evidence upon which the jury were authorized to find that appellant had waived this provision. The plaintiff testified that he notified the defendant's agent when about to begin the work of shelling and shipping the corn that he intended to shell it with a steam sheller, and that the agent said it would be all right. Such waiver was not written upon or attached to the policy, in compliance with its fourth provision, but we have held that such a provision may also be waived. *Insurance Co. v. Hart*, 149 Ill. 513, 36 N. E. 990; *Insurance Co. v. Dowdall*, 159 Ill. 179, 42 N. E. 606; *Insurance Co. v. Caldwell*, 187 Ill. 73, 58 N. E. 314. Such provisions, being for the benefit of the company, may be waived by it, and when having knowledge of the fact it should not be permitted to retain the money of the insured and treat the policy as in full force until a loss occurs, and then for the first time seek to avoid the policy. Counsel for appellant have referred to cases holding otherwise, including *Northern Assur. Co. v. Grand View Building Ass'n* (decided by the supreme court of the United States at its October term, 1901, by a divided court), 22 Sup. Ct. 133; but we have adopted a different rule in this state, and it must be applied in this case.

Criticisms are made upon the rulings of the court in reference to the evidence and in instructing the jury, but in the main they relate to the same question above mentioned and need not be here commented on.

After consideration of the arguments and of all the questions raised we find no sufficient cause to reverse the judgment. It will, therefore, be affirmed.

Waiver at the Time the Policy is Delivered.

GRAY v. GERMANIA FIRE INS. CO.

Court of Appeals of New York, 1898. 155 N. Y. 180,
49 N. E. 675.

The action was upon a policy of fire insurance for \$1,000, issued by the defendant October 1, 1892, insuring the goods of the plaintiffs in their store at Haverstraw, N. Y. It was a New York standard policy, and prohibited other insurance unless the consent of the company was indorsed thereon. It also provided that none of its agents should have power to waive any of its provisions except by a written indorsement on the policy. The defendant's agent applied to the plaintiffs to insure their goods. They informed him of their intention to procure insurance to the amount of \$3,000 in three different companies, and permitted him to write a policy for \$1,000 in the defendant company. When the policy was delivered the agent, in answer to an inquiry of the plaintiffs, stated that it was correct. They subsequently obtained two other policies upon the property insured, one for \$700 and the other for \$1,000. The defendant's agent had power to issue policies and to indorse permission for other insurance. But no such indorsement was made upon the policy in suit.

MARTIN, J. The only question we are called upon to determine in this case is whether the knowledge of the defendant's agent that the plaintiffs intended to procure other insurance upon the property covered by the defendant's policy constituted a waiver of the provision therein prohibiting other insurance without the indorsement upon the policy of an agreement to that effect. The courts below have so held. This conclusion was based upon the theory that as the defendant's agent knew that the plaintiffs intended to procure other insurance when the policy in suit was issued, and delivered it with that knowledge, it constituted a waiver of its provision as to other insurance. Manifestly, this theory cannot be sustained. It is well settled in this state that where an insurance company issues a policy, with full knowledge of facts which would render it void in its inception if its provisions were insisted upon, it will be presumed that it by mistake omitted to express the fact in the policy, waived the pro-

vision, or held itself estopped from setting it up, as a contrary inference would impute to it a fraudulent intent to deliver and receive pay for an invalid instrument. *Van Schoick v. Insurance Co.*, 68 New York 434; *Whited v. Insurance Co.*, 76 New York 415; *Richmond v. Insurance Co.*, 79 N. Y. 230; *Woodruff v. Insurance Co.*, 83 N. Y. 133; *Short v. Insurance Co.*, 90 N. Y. 16; *Forward v. Insurance Co.*, 142 N. Y. 382, 37 N. E. 615; *Wood v. Insurance Co.*, 149 N. Y. 382, 44 N. E. 80; *Robbins v. Insurance Co.*, 149 N. Y. 477, 484, 44 N. E. 159.

But it is manifest that that principle has no application to the facts in this case. When the defendant's policy was delivered neither of the other policies had been issued, but were subsequently obtained. Consequently the defendant's policy was valid in its inception. If it became invalid it was by the act of the plaintiffs in subsequently procuring additional insurance, without obtaining an indorsement upon the policy of the defendant's consent. As the defendant issued to the plaintiffs a policy which was valid when delivered, the fact that they informed the defendant's agent of their intention to subsequently procure other insurance was insufficient to justify the courts below in holding that there was a waiver of that condition, or that the defendant was estopped from insisting upon it. *Baumgartel v. Insurance Co.*, 136 N. Y. 547, 32 N. E. 990; *Moore v. Insurance Co.*, 141 N. Y. 219, 36 N. E. 191; *McNierney v. Insurance Co.*, 48 Hun 239. The distinction between the knowledge of an existing fact which renders a policy void when delivered and the omission of the insured to give notice of and procure the required consent to a subsequent act, which, by its conditions, invalidated it, although previously consented to, was clearly pointed out in the authorities cited. The decisions of the courts below are at variance with the principle that written contracts cannot be controlled or varied by oral evidence, and that a written instrument must be regarded as the receptacle of the entire contract between the parties, and merges all previous oral agreements in it. Nor do we think the contention of the respondents, that they were entitled to recover upon a parol contract of insurance made with the agent, can be sustained. There was no proof that the defendant's agent ever agreed to issue a policy different from the one delivered, or that he agreed that other insurance might be procured without the indorsement required. It is manifest that this action was upon

the policy issued by the defendant, and was not based upon any other agreement between the plaintiffs and the agent of the defendant.

VAN SCHOICK v. NIAGARA FIRE INS. CO.

New York Court of Appeals, 1877. 68 N. Y. 434.

FOLGER, J. This was an action upon a policy of fire insurance. It contained this condition: "Any interest in property insured not absolute, or that is less than a perfect title, or if a building is insured that is on leased ground, the same must be specifically represented to the company, and expressed in this policy in writing, otherwise the insurance shall be void." The fact is that part of the property described in the policy, as subject of the insurance, was a building on leased ground. That fact was not expressed in writing in the policy. The defendant claims that thereby the insurance was void, and puts itself thereon as a defense to the action. It is to be observed of this condition that it is not one of those which are subsequent to the formation of the contract, a breach of which may occur after there has been a valid contract made and entered into, and continued in existence for a part of its prescribed term. It is a condition precedent, lying at the threshold of the making of the contract, and which, if not then performed or not then obviated, prevents the formation of an enforceable contract. It is obvious that, this building being on leased ground, the very moment that the policy passed from the defendant to the plaintiff the insurance on it was void, if the condition holds. They were concurrent acts, the delivery of the contract, and a breach of this condition; so that at the same instant that the defendant said we insure this building, at the same instant the condition was broken and the insurance was void. So that, if nothing is shown to break the rigid effect of this condition, there never was any insurance by this defendant upon that building. We would scarce expect two parties to go through so senseless and trifling an act, if the facts were known to each at the time; but would rather conclude that they had by words or act agreed that the condition should not be considered as binding. "If these defendants were an entity, and could have stood near to that building when the oral negotiation

for insurance was made and completed, and have seen" and known that it was upon leased ground, "could it fairly be contended that they would have offered to the plaintiff, or that he would knowingly have received, as the correctly written evidence of the contract, this policy, with the condition in question contained in it as an operative and binding clause? We cannot suppose that either plaintiff or defendant would do the utterly absurd thing of making, with deliberation and knowledge, a contract that was void from inception, and was in contradiction of the facts and statements of the negotiation." It is plain that the plaintiff and the agent meant to contract and did contract for the insurance of that building as a building on leased land. *Cone v. Niagara Fire Ins. Co.*, 60 N. Y. 619. Hence we are not surprised that the plaintiff claims that the fact that the building was on leased ground was made known to the defendant when the policy was applied for; and that the policy was delivered and the premium accepted by them without insisting upon the fact and the condition. He makes that action of the company, with that knowledge, his reply to their defense based on that condition and its breach. * * *

It is difficult to make all cases upon this subject harmonize; but, by the force of authority, we are constrained to hold that such a condition as this may be waived by the insurer, by express words to that effect, or by acts done under such circumstances as would otherwise impute a fraudulent purpose, and as will estop him from setting up the condition against the insured. * * *

UNION MUT. INS. CO. v. WILKINSON.

United States Supreme Court, 1871. 13 Wallace 222.

[In an action on a life insurance policy, the insurance company, among other defenses, alleged that there was misrepresentation in the answers to the questions in the application. The age of the insured's mother at the time of her death was stated to be 40, and fever was stated to be the cause of death. The Supreme Court affirmed the ruling of the trial court, admitting parol evidence to show that the agent, who filled in the application, was told that the parties knew nothing about the facts alleged to have been falsely represented.]

MILLER, J., delivered the opinion of the court. * * * The defendant excepted to the introduction of the oral testimony regarding the action of the agent, and to the instructions of the court on that subject; and assigns the ruling of the court as error on the ground that it permitted the written contract to be contradicted and varied by parol testimony.

The great value of the rule of evidence here invoked cannot be easily overestimated. As a means of protecting those who are honest, accurate and prudent in making their contracts, against fraud and false swearing, against carelessness and inaccuracy, by furnishing evidence of what was intended by the parties, which can always be produced without fear of change or liability to misconstruction, the rule merits the eulogies it has received. But experience has shown that in reference to these very matters the rule is not perfect. The written instrument does not always represent the intention of both parties, and sometimes it fails to do so as to either; and where this has been the result of accident, or mistake, or fraud, the principle has been long recognized that under proper circumstances, and in an appropriate proceeding, the instrument may be set aside or reformed, as best suits the purposes of justice. A rule of evidence adopted by the courts as a protection against fraud and false swearing would, as was said in regard to the analogous rule known as the statute of frauds, become the instrument of the very fraud it was intended to prevent, if there did not exist some authority to correct the universality of its application. It is upon this principle that courts of equity proceed in giving the relief just indicated; and though the courts, in a common law action, may be more circumscribed in the freedom with which they inquire into the origin of written agreements, such an inquiry is not always forbidden by the mere fact that the party's name has been signed to the writing offered in evidence against him. * * *

The modern decisions fully sustain this proposition, and they seem to us founded in reason and justice, and meet our entire approval. This principle does not admit oral testimony to vary or contradict that which is in writing, but it goes upon the idea that the writing offered in evidence was not the instrument of the party whose name is signed to it; that it was procured under such circumstances by the other side as estops that side from

using it or relying on its contents; not that it may be contradicted by oral testimony, but that it may be shown by such testimony that it cannot be lawfully used against the party whose name is signed to it.

NORTHERN ASSURANCE CO. v. GRAND VIEW BLDG.
ASSOCIATION.

Supreme Court of the United States, 1902. 183 U. S. 308.

In an action¹ against an insurance company on a fire insurance policy, the plaintiff offered the original policy in evidence, containing, among other things, the following provisions:

“This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void if the insured now has or shall hereafter make or procure any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy.”

“This policy is made and accepted subject to the foregoing stipulations and conditions, together with such other provisions, agreements and conditions as may be indorsed hereon or added hereto, and no officer, agent or other representative of this company shall have power to waive any provision or condition of this policy except such as by the terms of this policy may be the subject of agreement indorsed hereon or added hereto, and as to such provisions and conditions no officer, agent or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or remission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached.”

The defendant, to maintain the issues on its part, called as a witness A. D. Borgelt, who testified that he was a member of the firm of Borgelt & Beasley, insurance agents at Lincoln, Nebraska, which firm wrote the policy in the Northern Assurance Company on the Grand View Building Association; that at the time he wrote the policy he had no notice or knowledge that there was other insurance upon the property covered by the policy in

¹ With but slight verbal changes, this statement of facts is taken from the opinion of the court.

suit, and the first time he knew of any other insurance was after the fire; that while Walsh might have mentioned that there was an existing policy, he, the witness, had no recollection of having known anything about the other insurance until after the fire. He further testified that on August 4, 1898, the premium paid for the policy in suit was tendered to the plaintiff company, which declined to take it. The defendant thereupon moved the court to instruct the jury to return a verdict for the defendant, which motion was overruled, and defendant excepted.

The jury, under the instructions of the court, found that the defendant company issued to the plaintiff company the policy described in the plaintiff's petition; that the property covered by said policy of insurance was burned on or about June 1, 1898; that the plaintiff, on or about July 26, 1898, furnished the defendant with proofs of the loss of said property by fire; that the policy contained the provision hereinbefore mentioned, providing that the policy should be void if the insured had or should thereafter make or procure any other contract of insurance on the property covered by the policy in suit, and that the policy was made subject to such condition, and that no officer, agent or other representative of the company should have power to waive any provision or condition of the policy except such as by the terms of the policy had been indorsed thereon or added thereto, and that no officer, agent or representative of the company should have power or be deemed or held to have waived such provision or condition unless such waiver was written upon or attached to the policy, and that no privilege or provision affecting the insurance under the policy should exist or be claimed by the insured, unless so written or attached; that there was at the time of the issuance of the policy in suit other insurance upon the insured property in the sum of \$1,500, in the Firemen's Fund Insurance Company; that Borgelt was recording agent of the Northern Assurance Company, at Lincoln, Nebraska, with authority from the defendant company to countersign and issue its policies and accept fire insurance risks in its behalf, and to collect and receive premiums therefor, and that he had issued the policy sued on as such agent; that Borgelt knew, when the policy in the defendant company was issued and delivered to the plaintiff company, that there was then \$1,500 subsisting insurance in the Firemen's Fund Insurance Company upon the insured property, issued

prior to the date of the policy of the defendant company, and that such knowledge was communicated to said Borgelt by and on behalf of the assured; that the actual cash value of the property covered by the policy in suit and destroyed by fire June 1, 1898, was \$4,140; that no consent to concurrent insurance of \$1,500 was indorsed on the policy in suit; and that, on August 4, 1898, the amount of the premium paid for the policy was tendered to and refused by the plaintiff.

Thereafter motions were respectively made by the plaintiff and defendant for judgment upon the findings and special verdict of the jury, and on January 14, 1899, the motion of the defendant was overruled, and exception was taken by the defendant, and the motion of the plaintiff was sustained, and judgment was entered in favor of the plaintiff and exception was taken by the defendant. A writ of error was prayed for by the defendant and allowed, and the cause was taken to the United States circuit court of appeals for the eighth circuit, where the judgment of the circuit court was affirmed, and the cause was then brought to this court by a writ of certiorari.

SHIRAS, J., delivered the opinion of the court: * * * What, then, was the case of *Union Mut. L. Ins. Co. v. Wilkinson*?¹ That was a case where the agent of a life insurance company had inserted in the application a representation of the age of the mother of the assured at the time of her death, which was untrue, but which the agent himself obtained from a third person and inserted without the assent of the assured. It was held that this untrue statement contained in the application did not invalidate the policy; that permitting verbal testimony to show how this untrue statement found its way into the application did not contradict the written contract sued on, but proceeded on the ground that this statement was not that of the assured. The trial court said to the jury that if the applicant did not know at what age her mother died, and did not state it, and declined to state it, and that her age was inserted by the agent upon statements made to him by others in answer to inquiries he made of them, and upon the strength of his own judgment, based upon data thus obtained, it was no defense to the action to show that the agent was mistaken. The case, as reported,

¹ 13 Wall. 222 (U. S.).

does not disclose that the plaintiff's testimony as to the way in which the untrue statement was put in the application was contradicted or denied by the company. It may therefore be presumed that the plaintiff's case, in that respect, was made out by undisputed evidence. And it would seem, such being the state of facts, that this court had reason to hold that the untrue statement was not made by the assured, and that it would operate as a fraud upon the plaintiff if he were not permitted to show this fact, which was not a fact or statement contained in the policy sued on, but an extrinsic fact or statement contained in the application. The defense made upon that statement was in legal effect a denial of the execution of the statement—a defense that can always be sustained by parol evidence.

However this may have been, we are unwilling to have the case regarded as one overthrowing a general rule of evidence. Some of the remarks contained in the opinion might seem to bear that interpretation, but not necessarily so. * * *

What, then, are the principles sustained by the authorities, and applicable to the case in hand?

They may be briefly stated thus: That contracts in writing, if in unambiguous terms, must be permitted to speak for themselves, and cannot by the courts, at the instance of one of the parties, be altered or contradicted by parol evidence, unless in case of fraud or mutual mistake of facts; that this principle is applicable to cases of insurance contracts as fully as to contracts on other subjects; that provisions contained in fire insurance policies, that such a policy shall be void and of no effect if other insurance is placed on the property in other companies, without the knowledge and consent of the company, are usual and reasonable; that it is reasonable and competent for the parties to agree that such knowledge and consent shall be manifested in writing, either by indorsement upon the policy or by other writing; that it is competent and reasonable for insurance companies to make it matter of condition in their policies that their agents shall not be deemed to have authority to alter or contradict the express terms of the policies as executed and delivered; that where fire insurance policies contain provisions whereby agents may, by writing indorsed upon the policy or by writing attached thereto, express the company's assent to other insurance, such limited grant of authority is the measure of the agent's power

in the matter, and where such limitation is expressed in the policy, executed and accepted, the insured is presumed, as matter of law, to be aware of such limitation; that insurance companies may waive forfeiture caused by nonobservance of such conditions; that, where waiver is relied on, the plaintiff must show that the company, with knowledge of the facts that occasioned the forfeiture, dispensed with the observance of the condition; that where the waiver relied on is an act of an agent, it must be shown either that the agent had express authority from the company to make the waiver, or that the company subsequently, with knowledge of the facts, ratified the action of the agent.

In the light of these principles, let us examine the contract that was made between the parties to the controversy before us. The contract was in writing, and in clear and unambiguous terms; that contract provided that "this entire policy, unless otherwise provided by agreement indorsed hereon or added thereto, shall be void if the insured now has, or shall hereafter make or procure, any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy," and that "no officer, agent or other representative of this company shall have power to waive any provision or condition of this policy, except such as by the terms of the policy may be the subject of agreement indorsed hereon or added hereto, and, as to such provisions or conditions, no officer, agent or representative shall have power or be deemed or held to have waived such provisions or conditions, unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached."

Such being the contract, and the property insured having been destroyed by fire on June 1, 1898, and the insurance company having denied liability because informed that other insurance was held by the insured on the same property, without the knowledge or consent of the company, this action was brought.

It is not pretended, as we understand the plaintiff's position, that by any language or declaration of the agent, at the time the policy was delivered and the premium paid, he claimed to have power to waive any provision or condition of the policy, nor that the plaintiff was induced to accept the policy by any promise of the agent to procure the assent of the company to

permit the outstanding insurance and to waive the condition. The plaintiff's case stands solely on the proposition that because it is alleged, and the jury have found, that the agent had notice or knowledge of the existence of insurance existing in another company at the time the policy in suit was executed and accepted, and received the premium called for in the contract, thereby the insurance company is estopped from availing itself of the protection of the conditions contained in the policy. In other words, the contention is that an agent with no authority to dispense with or alter the conditions of the policy could confer such power upon himself by disregarding the limitations expressed in the contract, those limitations being according to all the authorities presumably known to the insured. It was not shown that the company, when it received the premium, knew of the outstanding insurance, nor that, when made aware of such insurance, it elected to ratify the act of its agent in accepting the premium. On the contrary, all the record discloses is that the jury found that the agent knew, when the policy in the defendant company was issued and delivered to the plaintiff, that there was then subsisting fire insurance to the amount of \$1,500 in another fire insurance company, and that such knowledge had been communicated to the agent by or on behalf of the assured.

* * * * *

Besides the importance of such considerations to the parties immediately concerned in business transactions, the community at large have a deep interest in the welfare and prosperity of such beneficial institutions as fire insurance companies. It would be very unfortunate if prudent men should be deterred from investing capital in such companies by having reason to fear that conditions which have been found reasonable and necessary to put into policies to protect the companies from faithless agents and from dishonest insurers, are liable to be nullified by verdicts based on verbal testimony. Increased importance should be given to the rules involved in this discussion by the fact that, in latter times and in most, if not all, of the states, statutory changes have opened the courts to the testimony of the very parties who have signed the written instrument in controversy.

The CHIEF JUSTICE, JUSTICE HARLAN and JUSTICE PECKHAM dissent.

Incontestable Policies.**PATTERSON v. NATURAL PREMIUM MUT. LIFE INS. CO.**

Supreme Court of Wisconsin, 1898. 100 Wis. 118.

This is an action to recover upon an insurance policy issued by the appellant July 20, 1895, upon the life of Alexander W. Patterson, and originally payable to the administrators, executors or assigns of the insured. On the 4th of October, 1895, the policy was assigned, with the consent of the company, to the plaintiffs, who are the children of the insured. Alexander W. Patterson was 49 years of age at the time of the issuance of the policy, and was then married to his second wife, by whom he had no children, the plaintiffs being his children by a previous marriage. The first year's premium was paid upon the policy, and the insured died by his own hand February 25, 1896. * * * The policy itself contained the following provisions, among others: "This policy is absolutely incontestable from the date of its delivery and acceptance, except for nonpayment of premiums or misstatement of age; and the latter may be corrected or adjusted if the age of entry was within the limit of ages insured by this company. * * * Engaging in military or naval service in time of war or insurrection, without the written permission of the company, or death in consequence of, or in, violation of law by said insured, are risks not assumed by this company." There was no special provision as to death by suicide.

WINSLOW, J. (after stating the facts). * * * In determining what rule should be adopted by this court in the present case, there are numerous considerations which deserve attention. It must be borne in mind that the suicide clause has become so universal in policies that its absence at once attracts attention. It can hardly be otherwise than that the agent soliciting insurance under such a policy as this would at once call attention to its apparent liberality, in that there was no suicide clause, and, further, that there was in addition an "absolutely incontestable" clause; and the average layman (not to say lawyer), in looking it over, would conclude that it was in fact a very favorable policy to the insured. These provisions are all carefully framed by the insurance company, and expressly framed to induce people to

insure; and the principle is familiar and just that, when the policy is capable of two meanings, that which is most favorable to the insured is always to be adopted. *Utter v. Insurance Co.*, 65 Mich. 545, 32 N. W. 812. In at least one state (Missouri) there exists a statute which prohibits the defense of suicide, except when it was contemplated at the time of effecting the insurance, and makes void any contrary stipulation in the policy. Rev. St. Mo. 1889, § 5855. This statute has been enforced by the courts of Missouri, and by the circuit court of appeals of the United States, without apparent question as to its validity on the ground of public policy. *Keller v. Insurance Co.*, 58 Mo. App. 557; *Indemnity Co. v. Berry*, 1 C. C. A. 561, 50 Fed. 511. Bearing these things in mind, and while conceding the strength of the arguments upon public policy on which the *Ritter Case*¹ is based, we still think, in view of the prior decisions above cited to the contrary of the rule there laid down, and the general apparent acquiescence in those decisions by the courts and by the people, that we ought to hold, in accordance with those decisions, that, in a case where third persons are beneficiaries, intentional suicide of the insured while sane does not avoid the policy, in the absence of any provision in the policy to that effect. Whether the rule would apply to a case where the personal representatives of the insured were bringing the action for the benefit of the estate of the insured is not decided, because that case is not before us. In so holding, it becomes unnecessary to consider the effect of the incontestable clause upon this branch of the case. * * * But it is further claimed by the defendant that the evidence tended to show a fraudulent scheme on the part of Patterson, when he took out his policy, to obtain insurance on his life for the purpose of thereafter committing suicide, and defrauding the company for the benefit of his children. Doubtless this would be a good defense, if shown, unless it be cut off by the "incontestable clause." It should be a defense not based on the suicide alone, but on the whole fraud, of which the act of suicide was only the ultimate step. But the difficulty is that we have been unable to find any evidence which would justify the submission of that question to the jury. It is said that he falsely represented his state of health in his application, and concealed some of the grounds upon which he had previously made appli-

¹ 169 U. S. 139, 18 Sup. Ct. 300, 42 L. Ed. 693.

cation for a pension. There does not seem to be much merit in the claim. He submitted himself for examination to the company's medical examiner, who reported that he had dyspepsia, and that he was only a second-class risk. The company had full notice that he was not in first-class health, because the insured himself stated in his application that he had dyspepsia, and had had malaria, and had applied for a pension on the ground of indigestion brought on by exposure in the army. Besides, the incontestable clause would seem to effectually bar this defense. If this clause be not altogether a glittering generality, put in for no purpose except to induce men to insure, it would seem that it must cover such misstatements or omissions as are here alleged. Such clauses have been upheld by various courts. *Wright v. Association* (N. Y. App.) 23 N. E. 186; *Simpson v. Insurance Co.* (N. C.) 20 S. E. 517; *Goodwin v. Society* (Iowa) 66 N. W. 157; *Kline v. Association*, 111 Ind. 462, 11 N. E. 620. We see no reason why an insurance company may not take the risk of ascertaining for itself the condition of health of the insured.

Judgment for plaintiff affirmed.

CHAPTER VI.

ASSIGNEES.

Property Insurance.

CONTINENTAL INS. CO. v. MUNNS.

Supreme Court of Indiana, 1889. 120 Ind. 30, 22 N. E. 78.

MITCHELL, J. This is an appeal from a judgment rendered by the Montgomery circuit court, in favor of William Munns against the Continental Insurance Company. The questions for decision arise upon the following facts: On January 17, 1883, the insurance company above named delivered to John Bittle a policy of insurance by which it insured his dwelling-house and its contents, consisting of household furniture, etc., his barn, sheds and granary and their contents, severally, consisting of farming utensils, wagons, carriages, grain, horses, etc., for a period of five years, for a gross premium of \$37. At the time the policy was issued, Bittle owned the farm upon which the several buildings insured were situate, and the personal property covered by the policy was in the buildings therein described, the insurance being apportioned in specified sums upon the several buildings and the property therein situate. The policy contained a stipulation of the following purport: "If the applicant shall mortgage or otherwise incumber the property hereby insured, without notice to and consent of the company indorsed hereon, this policy shall become null and void." On the 27th day of June, 1885, Bittle, without notice to the company, and without its knowledge or consent, mortgaged the farm upon which the house, barn, and other buildings insured were situate, to the Provident Life & Trust Company of Philadelphia, to secure a loan of \$5,000. In the month of September following, he sold and conveyed the land, with the buildings thereon, to William Munns for the consideration of \$12,000, and in a few days thereafter, without any new consideration, transferred the policy of insurance to the purchaser. The latter soon afterwards presented the policy to the company's general superintendent, who

indorsed its consent thereon that the policy might be assigned to the purchaser, subject to all the terms and conditions mentioned or referred to therein. The company had no notice or knowledge of the existence of the mortgage at the time it gave its consent to the transfer of the policy. On July 27, 1886, the barn, shed and granary and their contents were consumed by fire, entailing a loss amounting to \$1,700. After the destruction of the property the company learned of the mortgage executed by Bittle, when it refused payment of the loss, on the ground that placing the incumbrance above mentioned on the property was a violation of the condition of the policy which rendered it null and void.

Whether the judgment shall be affirmed or reversed depends upon whether or not the company can avail itself of the default of Bittle in an action on the policy by the plaintiff. It must be assumed as a matter of course that the latter, when he purchased the farm and took an assignment of the insurance policy, had knowledge of the mortgage on the land and of the condition relating to incumbrances in the policy. Imputing to him knowledge of these facts, the question remains, did he take the property strictly as assignee, subject to all the infirmities, defenses, or any forfeiture which the laches or default of the assignor may have imposed upon it, or did the assignment, with the consent of the company, constitute the policy in effect a new and original contract between the latter and the assignee, unaffected by any previous forfeiture that may have occurred? If the transfer of the policy simply substituted the assignee to the rights which the assignor then had in the contract, it may well be said that if the latter had no rights by reason of the forfeiture, which occurred prior to the assignment, the next transfer conferred no new rights on the assignee. If, on the other hand, the assignment of the policy, with the assent of the company, constitutes a new, original and independent contract between the assignee and the insurer, then it is quite clear that no act of forfeiture committed by the assignor before the sale, assignment and consent is available against the policy in the hands of the purchaser newly insured. A contract of insurance is purely a personal engagement, by which the insurer, for a consideration paid, agrees to indemnify the person insured against loss arising from damage to his property. The contract appertains to the person with whom it

is made, and does not run with the property insured. *Nordyke & Marmon Co. v. Gery*, 112 Ind. 535, 13 N. E. Rep. 683; *Cummings v. Insurance Co.*, 55 N. H. 457. It is abundantly settled that upon a sale and transfer of property covered by a policy of insurance, and an assignment of the policy to the purchaser, duly assented to by the company, a new and original contract of insurance arises between the insurance company and the assignee, which the latter may enforce without regard to what may have occurred prior to the assignment. The policy, it is said in such a case, expires with the transfer of the estate, so far as it relates to the original holder; but the assignment and assent of the company thereto constitute an independent contract with the purchaser and assignee, the same in effect as if the policy had been reissued to him upon the terms and conditions therein expressed. *Wilson v. Hill*, 3 Mete. 66; *Fogg v. Insurance Co.*, 10 Cush. 337; *Flanagan v. Insurance Co.*, 25 N. J. Law, 506; *Cummings v. Insurance Co.*, 55 N. H. 457; *Steen v. Insurance Co.*, 89 N. Y. 315; *Shearman v. Insurance Co.*, 46 N. Y. 527; *Hooper v. Insurance Co.*, 17 N. Y. 424; *Ellis v. Insurance Co.*, 64 Iowa 507, 20 N. W. Rep. 782; *Wood*, Ins. §§ 110, 366.

Where an estate is sold and the policy transferred to the purchaser, and, upon notice to the insurer, he assents to it, a new and original contract of indemnity arises to the assignee, which he may enforce in his own name. The policy in such case expires with the transfer of the title to the estate, but the assent of the insurer to the assignment of the policy constitutes a new contract. *Pratt v. Insurance Co.*, 64 Barb. 589; *Fland. Ins.* 412, 484; *Foster v. Insurance Co.*, 2 Gray 219.

Aside from the prohibitory clause, policies of insurance, prior to any loss, are not in their nature assignable from one person to another without the express consent of the insurance company issuing them. They are therefore subject to the common-law rule, the effect of which is that where the assignee of a contract gives notice of the assignment to the other party to the instrument, and the latter assents to it, the transaction constitutes a new engagement between one of the parties to the contract and the assignee of the other, the terms of which are regulated and fixed by the original contract. *Fogg v. Insurance Co.*, *supra*; *Wilson v. Hill*, *supra*; *Hooper v. Insurance Co.*, *supra*; *Fland. Ins.* 484.

In order that a policy of insurance may be effectual, the insured must have an interest in the property covered by the contract of insurance, not only when the contract is entered into, but when the loss occurs. If the interest in the property and the interest in the policy become separated, the operation of the policy becomes suspended; and if a loss occurs while the policy is thus suspended, no recovery can be had. An assignment of an insurance policy, without a transfer of the property insured, would be an idle ceremony so far as transferring to the assignee any beneficial interest in the contract. On the other hand, the transfer of the property insured suspends the operation of the policy, which becomes inoperative for want of a subject-matter to act upon, until, by the assignment and assent of the company, a new contract of insurance, embodying the same terms and conditions as the old, arises between the latter and the purchaser. The contract of insurance thus consummated arises directly between the purchaser and the insurance company, to all intents and purposes the same as if a new policy had been issued, embracing the terms of the old. In such a case, no defense predicated on supposed violations of the conditions of the policy by the assignor will be available against the assignee. Until the latter himself does some act or permits a condition of things to exist in violation of the terms of the policy, he is not in default. *Ellis v. Insurance Co.*, 68 Iowa 578, 27 N. W. Rep. 762, and *Insurance Co. v. Garland*, 108 Ill. 220, are not opposed to the conclusions above stated. The case first cited involved a policy which contained a provision that "if the title of the property is * * * incumbered, * * * this policy shall be void." At the time the policy was assigned there was a mortgage on the property, which remained upon it until after the loss. This condition, as the court well says, pertained to the character of the risk as it then was or should thereafter be, and when the assignee became a party to the condition, he virtually agreed that if there was then or should thereafter be an incumbrance on the property, he should not, in case of loss, be entitled to recover. The contract provided against subsisting incumbrances as fully as it did against those which might be made thereafter, and the gist of the defense which the court sustained was that the incumbrance was allowed to remain. The court fully recognizes the doctrine of its former decisions which hold that an assignment of policy, with

the assent of the insurance company, creates a new contract, and that the assignee is not affected by the acts of the assignor. The other case relied upon was predicated upon a policy which contained a stipulation to the effect that if "the assured shall allow the buildings herein insured to become vacant or unoccupied and so remain, * * * this policy shall become void." It was properly held that this provision was imported into the new contract, and became a present agreement with the assignee, and that as he permitted the premises to remain unoccupied the company had the right to avoid the policy because he had violated his agreement. The distinction between the cases relied on and the present case is obvious. In those cases the defenses were not predicated upon acts or defaults of the vendor, but upon violations of the terms of the policy by the vendee himself. The policy involved in the present case contained no provision against subsisting incumbrances. Future incumbrances alone were referred to, and the established rule is that conditions which create forfeitures will not be extended by construction. *Insurance Co. v. Hazelett*, 105 Ind. 212, 4 N. E. Rep. 582; *Symonds v. Insurance Co.*, 23 Minn. 491.

There is no pretence that the assignee made any misrepresentation concerning the condition of the risk at the time the company gave its assent to the assignment. The rule applicable is that a failure or neglect on the part of the insured to make known facts which the insurer may regard as material to the risk is not a breach of a condition in the policy, avoiding it in case of any omission to make known every fact material thereto, because the insured has a right to suppose that the insurer will make proper inquiries concerning all facts except such as are supposed to be known or are regarded as immaterial. *Short v. Insurance Co.*, 90 N. Y. 10; *Burritt v. Insurance Co.*, 5 Hill 188; *Clark v. Insurance Co.*, 8 How. 235. In the case last cited the court said: "As to the ordinary risks connected with the property insured, if no representations whatever are asked or given, the insurer must, as before remarked, be supposed to assume them, and if he acts without inquiry anywhere concerning them, seems quite as negligent as the insured, who is silent when not requested to speak."

An applicant for insurance is not bound, unless inquired of, to disclose whether or not the property insured is incumbered.

As the public records usually give information in reference to such matters, he may assume that the insurer knew of any existing incumbrances or deemed it immaterial whether or not the property was incumbered.

Life Insurance.

WARNOCK v. DAVIS.

Supreme Court of the United States, 1881. 104 U. S. 775.

FIELD, J., after stating the facts, delivered the opinion of the court.

* * * The assignment of a policy to a party not having an insurable interest is as objectionable as the taking out of a policy in his name. Nor is its character changed because it is for a portion merely of the insurance money. To the extent in which the assignee stipulates for the proceeds of the policy beyond the sums advanced by him, he stands in the position of one holding a wager policy. The law might be readily evaded if the policy, or an interest in it, could, in consideration of paying the premiums and assessments upon it, and the promise to pay upon the death of the assured a portion of its proceeds to his representatives, be transferred so as to entitle the assignee to retain the whole insurance money.

STEINBACK v. DIEPENBROCK.

Court of Appeals of New York, 1899. 158 N. Y. 24, 52 N. E. 662.

PARKER, C. J.¹ In December, 1887, Alois Diepenbrock took out a policy of insurance on his life in the Equitable Life Assurance Society. He paid the premiums regularly down to December, 1892, a period of about five years, at which time the surrender value of the policy was about \$485. He was pressed for money, and finally sold the policy to the defendant Erdtmann for \$600, or something like \$115 more than he would have received by the surrender of the policy to the company. He had paid a much larger sum in premiums—something over \$2,000—and there seems to be no good reason why a person owning such

¹ Paragraphs of the opinion have been rearranged.

a policy, and obliged to sell it, should not be permitted to get back as much as possible of the money that he has paid out for insurance. His condition of health may have changed very materially, of which fact the company can take no advantage; for in its contract it made allowance for that possibility. There is no good reason for saying that an insured person should not have the right, whenever his necessities press him, because of a failing condition of health that assures a speedy death, to realize on his policy and obtain for it something like a fair price, which may, perhaps, be almost equal to its face value. * * *

The counsel for the appellant, in his argument, insisted with great earnestness and force that the position several times asserted by this court in support of the legality of the assignment of a policy of insurance to a person having no insurable interest in the life of the insured is a mistaken one, and in conflict with the decisions of the United States supreme court and the court of last resort in many of the states. *Warnock v. Davis*, 104 U. S. 775; *Insurance Co. v. Hazzard*, 41 Ind. 116; *Insurance Co. v. Sturges*, 18 Kan. 93; *Schonfield v. Turner*, 75 Tex. 324, 12 S. W. 626; *Basye v. Adams*, 81 Ky. 368; and *Helmetag's Adm'r v. Miller*, 76 Ala. 183,—furnish support for his assertion as to the rule in the United States supreme court and in some of the other states. Supported by these authorities, the counsel challenged the correctness of the rule that concededly has been long acquiesced in in this state by the courts and the profession. Indeed, Mr. Justice Field, in his opinion in *Warnock v. Davis*, supra, stated the rule in this state to be that a valid assignment of a policy of insurance could be made to a person without interest in the insured. But the appellant contends that, while this may be the rule here, the decisions in other jurisdictions demonstrate that our position is wrong as a matter of sound public policy, and, therefore, the true rule should be laid down, notwithstanding that expressions inducing the belief that the above rule obtained may have been made by our courts. It is urged that this task will not be a difficult one, for the reason, as the appellant contends, that there have been no cases in this state where the question was necessarily up for decision, and, therefore, all that has been said upon that subject by this court is mere dictum.

The result of our further examination persuades us that what has been understood to be the rule in this state is not only in

line with the authorities in most jurisdictions upon that subject, but is sound as a matter of public policy. It was formerly the rule in England that, while a policy of insurance could not be assigned at law, it could in equity. By the act of 1867 (30-31 Vict. c. 144) a policy of life insurance was made assignable at law, and in some of the decisions it was said by the court that the object of the statute was to enable the assignee to sue in his own name; but it did not in any other way improve the position of the assignee, who could before that secure the money in equity. *British Equitable Ins. Co. v. Great Western Ry. Co.*, 38 Law J. Ch. 132; *In re Turcan*, 40 Ch. Div. 5. The rule asserted by this court has also been held to be the law in many of our sister states in a number of cases, where the question has been raised either in actions brought by personal representatives of the assignor to recover the money received by the assignee on a policy or in suits brought by the company issuing the policy for the purpose of determining whether the personal representatives or the assignee were entitled to the proceeds, all claimants being made parties defendant. *Insurance Co. v. Allen*, 138 Mass. 24; *Eckel v. Renner*, 41 Ohio St. 232; *Martin v. Stubbings*, 126 Ill. 387, 403, 18 N. E. 657; *Fitzgerald v. Insurance Co.*, 56 Conn. 116, 13 Atl. 673, and 17 Atl. 411; *Clark v. Allen*, 11 R. I. 439; *Murphy v. Red*, 64 Miss. 614, 1 South. 761; *Rittler v. Smith*, 70 Md. 261, 16 Atl. 890. These authorities are, it seems to us, well grounded in principle. They recognize not only the existence of, but the necessity for, the rule that forbids any insurance upon the life of a person in which the person for whose benefit the insurance is made has no interest. Such a policy constitutes what is termed a "wager policy," or a mere speculative contract upon the life of the insured, with a direct interest in favor of its early termination. It is, in terms, forbidden by statute in England (14 Geo. III. c. 48) and in many other jurisdictions, including this state (Laws 1892, c. 690, § 55); and this court held in *Ruse v. Insurance Co.*, 23 N. Y. 516, that such insurance is void at common law, and that the English statute, in so far as it prohibits such insurance, is merely a declaratory act.

But the question we are considering presupposes a valid contract of insurance, the policy being issued either for the benefit of the assured personally, or for the benefit of some one having an insurable interest in the assured at the time of the taking out.

of the policy. Such a policy constitutes a contract to pay a certain amount of money to the payee on the death of the assured. It is a chose in action, with all the ordinary incidents belonging thereto, and as such may be assigned, either as collateral or absolutely, as the payee may elect. While an insurable interest in the payee is necessary, in the first instance, to the creation of a valid contract, it is not necessary that such interest should continue. The case of a wife divorced from her husband will serve as an illustration. The policy taken out for her benefit during the existence of the marriage relation is not affected by a subsequent severance of that relation through a decree of a court of competent jurisdiction, by which she ceases to have an insurable interest in his life. *Insurance Co. v. Schaefer*, 94 U. S. 457. The materiality of the value of the interest has relation to the question whether the policy is taken out in good faith, and not as a gambling transaction. If it be taken out in good faith, then a sound public policy would seem to require that the payee should be permitted to treat it as he may any other chose in action, and go to the best market he can find, either to sell it or borrow money on it. It would substantially confine him to such terms as the company issuing the policy should choose to make with him, if he should be limited in his choice of a purchaser to the party having an interest in the continuance of the life of the assured.

On the other hand, it is said that, if the payee of a policy be allowed to assign it, a safe and convenient method is provided by which a wagering contract can be safely made. The insured, instead of taking out a policy payable to a person having no insurable interest in his life, can take it out to himself, and at once assign it to such person. But such an attempt would not prove successful, for a policy issued and assigned, under such circumstances, would be none the less a wagering policy because of the form of it. The intention of the parties procuring the policy would determine its character, which the courts would unhesitatingly declare in accordance with the facts, reading the policy and the assignment together, as forming part of one transaction. *Cammack v. Lewis*, 15 Wall. 643, and *Warnock v. Davis*, 104 U. S. 775, were cases where the policies were taken out in order that

they might be assigned to the assignees, through their procurement, under circumstances that might well be held to be in evasion of the law prohibiting gaming policies. In *War-nock's Case* the agreement touching the procurement of the policy and the use to be made of it, including the promise to assign it, was in writing, and executed the very day the policy was applied for, and the day following the assured executed an assignment of the policy, which had in the meantime been issued in pursuance of such an agreement. The insurance company paid over the money to the assignees, and the court held that the personal representatives of the assured were entitled to receive from the assignees all the money, except the sums advanced by them under the agreement, plus the sum paid by them to the widow. In the opinion it is said that the assignment of the policy to a party not having an insurable interest is as objectionable as the taking out of a policy in his name. That remark was clearly true as applied to the facts of that case, for the policy was taken out in pursuance of an agreement to assign it. It was, therefore, in fact, a policy taken out for the benefit of parties having no insurable interest, although in form issued to the assured, and by him assigned to such parties. In such case the court will always declare the fact to be as it is, without regard to the effort of the parties to hide the truth and cheat the law. But the language employed by the court, and evidently advisedly, is broad enough to cover all assignments of policies to parties not having an insurable interest, including as well those taken out in good faith, and kept up as long as the financial condition of the insured permits, as those deliberately taken out for the purpose of speculation upon a life that the intended beneficiary, whether as payee in the policy or by assignment, has no interest in prolonging. The point of actual separation between the cases asserting the assignability and those asserting the nonassignability of policies of insurance to persons not interested in the continuance of the life of the assured seems to be that those asserting nonassignability proceed on the assumption that the question is one of law, and that, if a policy is not assignable in one case, it cannot be in any case; while in the other line of cases the underlying principle is that all valid contracts are assignable, but that contracts are not necessarily valid and free from the

taint of gambling because upon their face they appear to be regularly and properly issued. In order to ascertain the truth, all the facts and circumstances may be proved, and if it then appears that the parties intended by the contract to enable a third and uninterested party to speculate upon the life of another, the court will declare such contract invalid, not because of the assignment, but in spite of it. * * *

The judgment should be affirmed, with costs.

All concur, except Martin, J., absent.

Judgment affirmed.

CHAPTER VII.

BENEFICIARIES.

Property Insurance—Owners of Limited Interests.

HARRISON v. PEPPER.

Supreme Court of Massachusetts, 1896. 166 Mass. 288,
44 N. E. 222.

MORTON, J. The defendant, as life tenant, had an insurable interest in the property; and although it is alleged in the bill that she renewed the insurance on the building in her own name "as an entirety of estate, without qualification, * * * for the sum of twelve hundred dollars," and that that sum was paid to her as the full value of the dwelling house, without any deduction by reason of the plaintiff's ownership in fee, it is not alleged that the sum so paid exceeded the value of the plaintiff's interest or what the value of the plaintiff's interest was. If the amount received by the defendant did not exceed the value of her interest, then it is clear that the plaintiff has no right in equity to any portion of it. *Reitenbach v. Johnson*, 129 Mass. 316; *Martineau v. Kitching*, L. R. 7 Q. B. 436; *Stilwell v. Staples*, 19 N. Y. 401. But if we assume that the sum paid represents the total value of the dwelling house, and exceeds the value of the defendant's interest, and that the bill finally alleges this, still we do not think that the plaintiff is entitled to recover. A tenant for life is liable for any unauthorized act which tends to the injury of the inheritance; in other words, for voluntary waste. How far and under what circumstances he is liable for what is termed "permissive waste" is not altogether clear, and we need not consider. In *re Cartwright* (*Avis v. Newman*) 41 Ch. Div. 532; *Leake, Land*, 92; *Pol. Torts*, 285, 286; *Tayl. Landl. & Ten.* (7th Ed.) § 688; *Kerr, Inj.* 252. We have been referred to no case in which it has been decided that the neglect of the life tenant to insure is to be regarded as in the nature of voluntary or permissive

waste, though it has been held that the failure to pay taxes is (*Stetson v. Day*, 51 Me. 434) ; but that, manifestly, stands upon different ground. It is plain that the plaintiff is not entitled to recover unless she has some claim upon the funds in the hands of the defendant.

In the absence of anything that requires it in the instrument creating the estate, or of any agreement to that effect on the part of the life tenant, we think that the life tenant is not bound to keep the premises insured for the benefit of the remainderman. Each can insure his own interest, but, in the absence of any stipulation or agreement, neither has any claim upon the proceeds of the other's policy, any more than in the case of mortgagor and mortgagee, or lessor and lessee, or vendor and vendee. *Burlingame v. Goodspeed*, 153 Mass. 24, 26 N. E. 232; *Trust Co. v. Boardman*, 149 Mass. 158, 21 N. E. 239; *Insurance Co. v. Boyden*, 9 Allen, 123; *Warwicker v. Bretnall*, 23 Ch. Div. 188; *Leeds v. Cheetham*, 1 Sim. 146; *Rayner v. Preston*, 18 Ch. Div. 1; *Kearney v. Kearney*, 17 N. J. Eq. 59, 71. The contract of insurance is a personal contract, and inures to the benefit of the party with whom it is made, and by whom the premiums are paid. It is a contract of indemnity against loss. The sum paid "is in no proper or just sense the proceeds of the property." *Lerow v. Wilmarth*, 9 Allen, 382, 385; *Insurance Co. v. Boyden*, Id. 123; *Wilson v. Hill*, 3 Mete. (Mass.) 66; *King v. Insurance Co.*, 7 Cush. 1; *Insurance Co. v. Lawrence*, 10 Pet. 507, 512.

It is not averred, and does not appear, that the defendant intended to make a present of the proceeds of the policy to the plaintiff, or was insuring for her benefit. Whether the amount of indemnity received by the defendant for her loss was more or less than the value of her interest cannot affect the plaintiff; nor can the defendant be converted into a trustee for the plaintiff by the mere fact that the amount which she received was equal to the full value of the house. It was paid to and received by her as indemnity for the loss which she had sustained, and, as already observed, does not stand in the place of the property insured. In *Welsh v. Assurance Corp.*, 151 Pa. St. 607, 617, 25 Atl. 142, relied on by the plaintiff, there was evidence that the life tenant intended to insure for the benefit of herself and the remainderman. The plaintiff argues that

sound public policy requires that money received by a life tenant on a total loss by fire should be used in rebuilding, or should go to the remainderman, reserving the interest to the life tenant for life. This argument proceeds on the assumption that the proceeds of the insurance take the place of the property insured,—a view which, as we have seen, is contrary to our own and other decisions. If the contract of insurance is one of indemnity to the insured for the loss sustained by him, it is difficult to see how a sound public policy could be subserved by holding that he shall use what belongs to him for the benefit of some one else.

Life Insurance.

LEMON v. PHOENIX MUTUAL LIFE INS. CO.

Supreme Court of Connecticut, 1871. 38 Conn. 294.

SEYMOUR, J. * * * First, the fact that Mr. Peterson caused the policy to be made payable to Miss Lemon, indicates a settled purpose in his mind that she should have the benefit of it; and his acts immediately after will naturally be construed as intended to carry out such purpose. Second, when, therefore, the policy is by Mr. Peterson's order sent to Miss Lemon's brother, we naturally regard it as sent to him for her, as depositary for her, and for her benefit, rather than as depositary for Mr. Peterson himself. Third, it appears from the committee's report that the intended change in the policy for her benefit was communicated to her before it was made, and that it was upon her suggestion that the policy was placed in the hands of her brother. Fourth, after the policy was changed and made payable to Miss Lemon, and sent to her brother, she was informed by Mr. Peterson of what he had done. Upon these considerations, in view of all the facts in the case, we think we must find that there was an executed gift of the policy to Miss Lemon, and that the delivery to her brother was as depositary for her. * * *

It is clear that the consideration for policy number three was the surrender of policy number two. Mr. Peterson's health was such that number three would not have been issued if the company had not been bound by number two. And inasmuch

as policy number two belonged to the petitioner, it was her property that, without her consent, was used to procure number three. She is, therefore, equitably entitled to the benefit of this policy.

Right to Change the Beneficiary Reserved.

JORY v. SUPREME COUNCIL, AMERICAN LEGION OF HONOR.

Supreme Court of California, 1894. 105 Cal. 20, 38 Pac. 524,
26 L. R. A. 733.

GAROUTTE, J. The right of ownership to the proceeds of a \$2,000 benefit certificate, issued by a mutual benefit society known as the "American Legion of Honor," forms the subject of this litigation. The society is not an active party to the litigation, having paid the money into court, and being entirely satisfied with the court's adjudication as to whom it belongs. The respondent and appellant are brother and sister, and the beneficiary certificate was taken out by the mother, Emily Kate Jory, and made payable upon her death to the daughter, appellant, or any other member of the mother's family whom she might thereafter in her lifetime designate. The by-laws of the society provide that members may, at any time when in good standing, surrender their benefit certificates, and have new ones issued, payable to such beneficiary dependent upon them as they may direct, subject, however, to the provisions of section 2: "Such change to be made upon petition to the supreme secretary, signed by the member desiring to make the change, attested by the secretary of the subordinate council, and having the seal of the subordinate council attached substantially in accordance with the form prescribed in this section. * * * The fee to be paid for a new certificate issued shall be one dollar, and must accompany the petition. No change of beneficiary shall be made in any other manner than herein prescribed, * * * provided that, in case of the loss or destruction of the old certificate, satisfactory evidence of such loss or destruction shall be produced, by affidavit or otherwise, before a new certificate be issued. * * * No act of a subordinate council in the admission of any member to

membership in this order, and no act of any member done for the purpose of changing his or her beneficiary, shall be recognized by or deemed binding upon the supreme council, or as entitling the person admitted, or the new beneficiary named, to any benefits from this order, unless such acts shall be in strict accordance with the provisions contained in the laws and constitution prescribed by the supreme council, nor until such acts have been ratified and approved by the supreme council." Several years after this certificate was issued, the mother became desirous to change the beneficiary named therein, to-wit, the appellant daughter, and to substitute therefor the respondent son; and in furtherance of such desire, and for the purpose of complying with the provisions of the laws of the society, she attempted to secure control of the original certificate, which was then in the keeping of her daughter appellant, in order that she might surrender the same to the society; but she was unsuccessful in this endeavor. Upon this question the court found the fact to be that "she (the daughter) refused to redeliver the same to said Emily Kate Jory, although frequently requested so to do by her, as alleged in said amended complaint, but kept and concealed the same for the purpose of endeavoring to prevent her said mother from designating the plaintiff herein as the beneficiary thereunder, and securing the said \$2,000 herself, and so kept and concealed it until after her mother's death, as alleged in the amended complaint on file herein." And this finding is supported by the evidence. Being unable to secure the original certificate, the mother regularly took all the other steps required by the laws of the order for the purpose of changing the beneficiary, and accompanied her application for a change with an affidavit stating the reason why the original certificate was not surrendered, and further stating therein that she made her son, the respondent herein, her sole beneficiary under said certificate. The society still refused to issue the new certificate, upon the ground that the original was neither lost nor destroyed, and yet had not been surrendered. Matters remained in statu quo until the death of the mother, when this litigation arose between the children, and was decided by the trial court in favor of the son.

Laying aside any question of interest in the original bene-

ficiary certificate resting in the daughter by virtue of matters arising in parol between the mother and the daughter, we are clear that, as between the original beneficiary, the daughter, and the proposed new beneficiary, the son, the proceeds of this policy belong to the son. As between them, there was a substitution of beneficiaries in the eyes of a court of equity. If the Legion of Honor was here as an aggressive party, insisting, as against the claims of the son, upon a strict compliance with its by-laws before it could be compelled to take money from its treasury, possibly a different question would be presented; but, as between these parties litigant, the court will administer justice from the standpoint of equity, and bring to the solution of this question those broad principles upon the basis of which equity always deals. The general rule unquestionably is that a change of a beneficiary cannot be made by the insured unless a substantial compliance with the laws and regulations of the society is had; yet courts of equity have recognized various exceptions to this general principle, and the facts of this case bring it squarely within one of the well-recognized exceptions. This exception is builded upon the principle that equity does not demand impossible things, and will consider that done which ought to have been done; and is embraced within the proposition that, when the insured complies with all the requirements of the rules for the purpose of making the substitution of beneficiaries with which he has the power to comply, he has done all that a court of equity demands. See *Supreme Conclave v. Capella*, 41 Fed. 1, approved in *McLaughlin v. McLaughlin* (Cal.) 37 Pac. 865; *Grand Lodge v. Child*, 70 Mich. 164, 38 N. W. 1; *Isgrigg v. Schooley*, 125 Ind. 95, 25 N. E. 151; *Marsh v. American Legion of Honor*, 149 Mass. 512, 21 N. E. 1070. The present case comes squarely within this exception, and in principle is identical with some of the cases we have cited. For the purpose of changing the beneficiary, the insured complied in detail with every rule of the society, save the single one of surrendering the certificate, and this she was unable to do after using due diligence to that end. Impossibilities are not required, and if the certificate had been lost or destroyed, and thus the surrender made impossible, equity would have treated the surrender as duly made; and in legal effect the certificate was lost in this case. But there is another

well-settled principle of equity equally fatal to appellant's claims. No person can take advantage of his own wrong. No man is allowed to come into a court of equity and reap beneficial results from his own iniquity. If Mrs. Jory had the right to make the change of beneficiaries, and did all that it was possible for her to do towards making such change, but was prevented by the acts of appellant from a consummation of her intentions, then appellant will not be allowed to derive any benefit from her fraudulent conduct. If a fraud of her own practicing prevented a legal substitution of beneficiaries, then, as against her, an equitable substitution will be held to have taken place. If the insured, Mrs. Jory, had a legal right to make a change of beneficiaries at the time she attempted so to do, then the maxims of equity which we have applied to the facts of the case dispose of this litigation fully and entirely. But, as a further ground of defense to the action, it is insisted by appellant that her mother had no such right. Appellant says she had a vested interest in the certificate, and rights under it which could not be taken away from her by a legal substitution of beneficiaries, even if such substitution had been made by the insured. Under this claim of the appellant the question as to an actual substitution would seem to be immaterial; for, if the insured had proceeded under the rules and laws of the order, and obtained a substitution of beneficiaries perfect in all its parts, still, as between the parties here litigating, it would not be conclusive as establishing title to its proceeds in the holder thereof. For we are in a court of equity, and administering justice to these parties according to their equities.

The principle here under consideration is the most recent growth of mutual benefit association law, a branch of the law which in itself is young in years; and we know of nothing in the law which deprives a person contemplating membership in a mutual benefit association from so contracting with the proposed beneficiary as that, when such certificate is issued, equities in favor of the beneficiary are born, of such merit that the insured member has no power to defeat them. The few authorities shedding light upon this question declare the rights of the beneficiary are such as to create a vested interest in the proceeds of the certificate. *Smith v. Society*, 123 N. Y. 85, 25

N. E. 197; *Nix v. Donovan* (City Ct. N. Y.) 18 N. Y. Supp. 435; *Maynard v. Vanderwerker* (Sup.), 24 N. Y. Supp. 932. Possibly this is not a correct declaration of the principle of law applicable to the conditions; for a second beneficiary might be substituted, wholly innocent of the contractual relations existing between the insured and the first beneficiary, and his substitution give rise to the creation of equities in his behalf all-controlling upon a judicial disposition of the rights of the parties concerned. If the original beneficiary's interest was vested, no subsequent conditions could possibly arise which would defeat his right; and, for this reason, we think it can hardly be termed a vested interest. The whole matter seems to be rather a question of equities, and the stronger and better equity must prevail. The illustration we have used does not arise in the present case, for we here have no clash of equities. The second beneficiary possesses no equities. He is a volunteer pure and simple. His status during the life of the insured is well described in *Smith v. Society*, supra, where the court said: "The designation was in the nature of an inchoate or unexecuted gift, revocable at any moment by the donor, and wholly within his control." We think a court of equity should declare the insured estopped from substituting a second beneficiary of the character here involved, whenever sound equities are extant in favor of the first beneficiary; and, such estoppel being in force against the insured, it is equally in force and may be successfully urged against the volunteer beneficiary. The respondent is a volunteer beneficiary, and it only remains for us to ascertain from the record what the appellant's equities are, as disclosed by the evidence. She claims by her answer that she and her mother entered into a mutual agreement whereby each should join a mutual benefit society and make the other a beneficiary under the certificates issued, and that said agreement was carried out. Appellant further alleges that she paid all initiation fees, dues, and assessments upon the benefit certificate taken out by her mother. If these moneys were paid out by appellant under and by virtue of a contract between the parties, and in pursuance of this agreement and scheme for mutual insurance, then she has equities which entitle her to recognition in a court of justice, for it would be gross imposition and fraud upon her to allow the insured to

change her beneficiary under these circumstances. Though wrong and injustice form an unpleasant sight to a court of equity, yet that court will never close its eyes because the sight is an unpleasant one, but rather, with vision all the keener, will reach out its strong arm to protect the wronged and innocent party.

Judgment for plaintiff affirmed.

GRAND LODGE A. O. U. W. v. FRANK.

Supreme Court of Michigan, 1903. 133 Mich. 232, 94 N. W. 731.

MONTGOMERY, J. Charles P. Frank, a resident of Detroit, died on the 5th day of February, 1902, leaving at the time of his death, as his heirs at law, his wife, Anna Estella Frank, and his father, Lewis M. Frank. On April 8, 1887, Charles P. Frank took out a beneficiary certificate for \$2,000 in the Ancient Order of United Workmen, making his wife, A. Estella Frank (Anna Estella Frank), the beneficiary thereunder.

The present bill is a bill of interpleader, setting out that on July 20, 1898, Charles P. Frank surrendered the beneficiary certificate, and took out a new one, payable to his mother, Elizabeth V. Simonton; that Mrs. Simonton died in January, 1900, and Charles P. Frank died in February, 1902. The bill further sets out that the heirs at law of Charles P. Frank are the defendants, Lewis M. Frank and Anna Estella Frank. In her answer, in the nature of a cross-bill, Anna Estella Frank avers that the attempted surrender of the certificate by Charles P. Frank, and the designation of the new beneficiary, made in July, 1898, were made at a time when Charles P. Frank was insane and mentally incompetent, and asked to have this fact so decreed, and that the attempted change of beneficiary be decreed to be null and void, and that the insurance money due be decreed to be paid to her. To this answer Lewis M. Frank demurred on the ground that the pleadings do not set up a right in defendant Anna Estella Frank to which the court can apply a remedy, and that she had no vested interest in the beneficiary certificate, and was not a party to the contract, and is not entitled to raise the question of the insanity of Charles P. Frank.

The answer sets up all the facts necessary to an understand-

ing of the case, and shows the defendant Anna Estella Frank entitled to the relief which she prays, unless it be held that she had no interest in the subject-matter as entitled her to raise the question of Charles P. Frank's mental incompetency. It is true that, as the beneficiary named in this certificate, she had no vested interest in the certificate of Charles P. Frank prior to his death; but she had a contingent interest which vested at his death, and, unless there is some imperative rule of law which precludes her from raising the question of his mental capacity, it should be held that she has the right to intervene in this manner.

It is the contention of the counsel for Lewis M. Frank that only Charles P. Frank himself, or his heirs at law, could raise the question of his mental incapacity. It is said that the transfer was not void, but voidable, and that the option of voiding it rests only with one having an interest; that during his lifetime Charles P. Frank had such interest, and that at his death his heirs at law are the only ones who had such interest. If this be the correct view, it must rest upon the ground that the heirs at law or representatives were entitled to raise the question because the right is devolved upon them under the statute of distribution or descent, and that one occupying the position of beneficiary, named by the voluntary act of Charles P. Frank, does not stand upon the same vantage ground. We think this distinction cannot be supported in reason or authority. It has been frequently held that the heirs at law may intervene in such cases after the death of the grantor to set aside a grant made by one mentally incompetent. *Peters v. Peters*, 101 Mich. 291, 59 N. W. 609; *Curtis v. Brownell*, 42 Mich. 165, 3 N. W. 936; *Rogers v. Blackwell*, 49 Mich. 192, 13 N. W. 512. In none of these cases had the party attacking the transaction any vested interest at the time of the alleged transfer. We think the better rule is that where such an attempt to change the beneficiary is made, and fails because of the want of mental capacity on the part of the assured, the original designation remains in force. *Elsay v. Odd Fellows*, 142 Mass. 224, 7 N. E. 844; *Smith v. Railroad Association*, 168 Mass. 213, 46 N. E. 626. A case quite in point is the recent one of *Owaby v. Supreme Lodge Knights of Honor*, 101 Tenn. 16, 46 S. W. 758.

CHAPTER VIII.

CREDITORS.

Life Insurance—Debtor as the Insured.

HOLMES v. GILMAN.

Court of Appeals of New York, 1893. 138 N. Y. 369, 34 N. E. 205, 20 L. R. A. 566.

The following are the material facts:

In December, 1880, Arthur C. Gilman became a member of the firm of J. H. Labaree & Co., dealers in teas and coffees in New York City, and continued such member until his death, which occurred suddenly on the 15th of December, 1890. During all this time he was a trusted member of the firm, and practically had exclusive charge of its office affairs, which included the management of the firm bank account and the making of all notes and other paper issued in the business of the firm. For several years prior to his death he had prepared semiannual statements purporting to show the financial condition of the firm, and these statements he had rendered to its different members. The last one had been rendered as of the date December 1, 1890, and showed the firm with assets exceeding liabilities by nearly the amount of \$200,000. This statement was received by the plaintiff (who resided in Cincinnati) about December 11, 1890. For some reason, which is not made plain by the proof, and soon after the above date, the members of the firm commenced an examination as to its condition, and the examination was not concluded until after Gilman's death, when it was discovered that the firm was insolvent by more than \$36,000. Further investigation brought to light the fact that Gilman, commencing in the year 1882, and continuing down to his death, had wrongfully and fraudulently taken from the assets of the firm large sums of money, which he had wrongfully appropriated to his own use. By reason of this dishonest conduct on the part of Gilman the firm was, in De-

cember, 1890, insolvent, instead of having a surplus of nearly \$200,000, as shown by his last statement. The amount wrongfully taken by him was over \$220,000, and it was done by means of false entries in the books of the firm, spread over the period of about eight years. There were found among his papers in the safe at the office of the firm four policies of insurance upon his life; one for \$5,000, issued and dated March 9, 1880, and three other policies, aggregating \$45,000, and issued between the dates of April, 1884, and January, 1888. Also two certificates of his membership in a benefit association, one dated in August, 1881, and the other in January, 1885. Each of the four policies was issued on Gilman's application, made in the name of his wife, and each was in terms payable to her. The certificates were also issued on his application, signed by him, in which he stated he desired his death loss to be paid to his wife. It does not appear that any of the premiums upon any of the policies were paid by Mrs. Gilman, or with funds provided by her, or that she had any knowledge of the existence of the policies prior to her husband's death. All of the premiums on the above-mentioned policies, aggregating about \$4,000, were paid by Gilman out of the firm funds, and the premiums which fell due after the year 1882 on the above-mentioned \$5,000 policy were also paid from such funds.

When the firm was discovered to be insolvent, the plaintiff provided funds for the payment of its debts and the continuance of its business. The policies of insurance having been collected and paid into the trust company, the plaintiff and the defendant Mrs. Gilman each claimed the right to recover the whole sum, amounting to over \$56,000. The referee awarded the above-mentioned \$5,000 policy, which was dated and issued in March, 1880, to the defendant, subject to the lien of about \$1,000 of premiums becoming due subsequent to 1882, and paid by Gilman out of the funds of the firm. The policy itself was taken out prior to any conversion of firm funds, and the premiums thereon prior to 1882 were paid by Gilman out of his own funds. The policies aggregating \$45,000 were obtained and maintained, as the referee finds, from the funds of the firm, which the evidence traces and identifies as thus invested.

PECKHAM, J. * * * The claim of the plaintiff to recover the moneys arising from the payments of these policies is based upon the principle which allows a cestui que trust to follow trust funds, and to appropriate to himself the property into which such funds have been changed, together with the increased value of such property, provided the trust fund can be clearly ascertained, traced, and identified, and provided the rights of bona fide purchasers for value without notice do not intervene. The right has its basis in the right of property, and the court proceeds on the principle that the title has not been affected by the change made of the trust funds, and the cestui que trust has his option to claim the property and its increased value as representing his original fund. The right to follow and appropriate ceases only when the means of ascertainment fail. It is a question of title. *Van Alen v. Bank*, 52 N. Y. 1; *Newton v. Porter*, 69 N. Y. 133; *Ferris v. Van Vechten*, 73 N. Y. 119; *Cavin v. Gleason*, 105 N. Y. 256, 260, 11 N. E. Rep. 504; *In re Hallett's Estate*, 13 Ch. Div. 696. It is somewhat akin to the principle decided in *Silbury v. McCoon*, 3 N. Y. 379, where corn was wrongfully taken from its owner, and converted into whisky. The court held the property was not changed in the hands of the wrongdoer, and the whisky belonged to the owner of the original material, no matter how much it had been increased in value. The case of *Pennell v. Deffell*, 53 Eng. Ch. 372, 388, 389, discusses the principle as thus stated, and agrees to it. That a partner occupies a fiduciary position with regard to his copartners and the funds of the firm, and will not be permitted to make a personal profit out of the use of such funds, is, I think, clearly established. 1 *Lindl. Partn.* (2d Amer. Ed.) 303; *Featherstonhaugh v. Fenwick*, 17 Ves. 298; *Anderson v. Lemon*, 8 N. Y. 236; *Mitchell v. Reed*, 61 N. Y. 123; *Riddle v. Whitehill*, 135 U. S. 621, 10 Sup. Ct. Rep. 924. Although partners do not, in the strict sense of the term, occupy the position of trustees towards each other and towards the firm funds, yet the position is one of a fiduciary nature, calling for the maintenance and exercise of the greatest good faith between them. Such a relationship authorizes the same remedy on behalf of the wronged partner as would exist against a trustee, strictly so called, on behalf of a cestui que trust. Per *Jessel, M. R.*, in *Re Hallett's Estate*,

13 Ch. Div. 696, 712. While legally incorrect to describe the fraudulent abstractions made by Gilman of the funds of the firm as embezzlements, the description is harmless. It was a monstrous and gross breach of the duty he owed the firm, and the right of the firm to follow the funds is not affected because the act could not be regarded in law as an embezzlement. The right to follow the funds springs from the fiduciary nature of Gilman's position with regard to them. These general positions are not really denied by the defendant. It is claimed, however, that the tracing and identification of the funds have not been sufficiently proved in fact, and it is also urged that there has been an actual mingling of the firm funds with the private funds of Gilman in the purchase and maintenance of the policies. I have looked carefully through the evidence upon these questions of fact, and I think the findings of the referee are fully sustained, and that no exception can prevail on such grounds. If these preliminary questions be decided against him the counsel for defendant then urges that the rule clearly is, if the trust fund has become mingled with money or property of the trustees or others, equity impresses the proceeds with a trust to an amount equal to the original trust fund and interest, and will go no further. He then claims that the firm funds which went to the purchase of the policies and the payment of the annual premiums were mingled with the property right of the wife, called her "insurable interest" in her husband's life, and so the policies were not wholly the result of the use of those firm funds, and therefore the plaintiff can have only a lien on the policies or the money arising from their payment, to the amount of the premiums paid with the firm funds, and the interest thereon. This is really the chief question in the case.

Where moneys have been misapplied, and have been used as a portion of a larger amount, which has been invested in other property, the property thus acquired does not, as a whole, belong to the owners of the moneys misapplied. It does not belong to him because it has not been purchased or acquired wholly with his money or funds, and hence it is that such property is held charged with a lien at least to the amount of the trust funds invested in it. It is not necessary to here decide it, because we take another view of the facts, but I am

not at all prepared to admit that under no circumstances is the cestui que trust entitled to recover back anything more than the amount of his property and interest, where there has been a mingling of funds. In case the trustee took a thousand dollars of trust funds and five hundred of his own, and purchased property, which advanced in value to twice its original sum, I have seen no case where the point has been determined that the whole increased value belongs to the trustee, and that only the original sum wrongfully taken, and interest, can be given to the cestui que trust, although it was by reason of the wrongful use of the trust funds that the trustee was enabled to realize such value. If, in such case, the cestui que trust were not allowed to at least participate proportionately in the increased value, it would appear to be a violation of the principle that the trustee cannot ever be permitted to make a profit out of the use of the trust funds. It seems to me to be a case for the application of the doctrine that the parties became co-owners of the property at the option of the cestui que trust, in the proportion which their various contributions bore to the sum total invested. In this case, however, the defendant is enabled to claim a mingling of funds and property only by treating the right of a wife to insure the life of her husband for her benefit as a species of property which has been mingled with the funds of the firm, the result of the combination being the procurement of the policies.

We do not regard this right as property in any such light as to bring the case within the principle of the authorities upon the subject of a mingling of funds in the purchase or acquisition of other property. The right of a wife to insure the life of her husband for her own benefit is not property. It is more in the nature of a power or a privilege to make a valid contract. It is a status and not a property right. The common law, upon motives of public policy, held that there must be what was termed an "insurable interest" in the life which was insured, or else the policy was a dangerous kind of a wager, and therefore void. To take a policy out of such a class it was necessary to show that the insured had some interest in the continuance of the life of the cestui que vie. Who had such an interest as to give a right of insurance was frequently a matter of some discussion and of possible doubt. It may not

even now perhaps be said that the precise nature, character and extent of the interest in another's life, which shall render that life insurable, have been formally and plainly laid down. It is said by the federal supreme court that one essential is that the policy shall be obtained in good faith, and not for the purpose of speculating upon the hazard of a life in which the insured has no interest. *Insurance Co. v. Schaefer*, 94 U. S. 457, 460. An interest which is insurable must be an interest in favor of the continuance of the life, and not an interest in its loss or destruction. If any person could be thought to have an interest in the continuance of the life of another it would be a wife in the life of her husband. Judge Allen, in *Baker v. Insurance Co.*, 43 N. Y. 283, regarded the question as decided that a wife had at common law an insurable interest in the life of her husband. Judge Andrews held to the same effect in *Brummer v. Cohn*, 86 N. Y. 11, 14. These cases favor the view that the statute upon the subject of the insurance of the husband's life in favor of his wife, while it regulates, does not create, the right. I do not intimate that, if the statute created the right, it would in any way alter its nature. That such a policy was valid at common law simply makes it clearer that it is the nature of the relationship between man and wife that makes the policy valid, and relieves it from the objection that it is a wager policy. That relationship is not property in any fair sense of the term. It creates an insurable interest in the life of another, of a nature the same as a parent has in a child or a child in a parent; that is, an interest in the preservation of the life, and not in its destruction. Being so circumstanced, a policy of insurance upon such life is not a wager policy, and is therefore a valid policy. It is the same question, but it may perhaps appear a little clearer when it is asked whether the power or privilege of a parent or child or creditor to insure the life of his parent or child or debtor is property. A man has an insurable interest in his own life. If he take trust funds and procure such insurance, has he thereby mingled those funds with other property, i. e., with his right to insure his own life? And can it be said that the policy is the product of such mingled funds and property, so that nothing but the original amount of the trust funds and interest can be recovered back from the estate? The fact is apparent that a policy

of insurance upon a life is not a policy of indemnity. The sum named in the policy is to be paid when the insured life has ceased, no matter how really valueless such life may have in the meantime become. The power of the wife to procure insurance is not in the least unfavorably affected by the fact that insurance in her favor has already been secured. As was said by Shaw, C. J., in *Loomis v. Insurance Co.*, 6 Gray 396, the amount of the insurance is immaterial. The premium is computed, upon the law of averages, to be the exact equivalent for the risk. So, if insurance had been taken out by the husband on his life in the wife's name, she could herself take out more upon just as favorable terms, and just as expeditiously as if none had been taken. No one company might desire to go above a certain amount upon any one risk, but the ability to procure further insurance is practically unrestrained. The wife has therefore suffered no loss by the original procurement of this insurance, and its subsequent maintenance unknown to her, so long as the premiums have not been paid with her moneys or in any way from her estate. In other words, her property has not been used for any purpose. Her power to obtain valid insurance upon his life remained wholly unimpaired and unaffected by the insurance already obtained. The fact that she had what is termed an "insurable interest" was only material for the purpose of upholding the validity of the insurance in question. I cannot see how it can be regarded as property in any event. That a life insurance policy has not the features of a contract of indemnity, and is not such a contract, has been unquestioned for a number of years. *Rawls v. Insurance Co.*, 27 N. Y. 282; *Olmstead v. Keyes*, 85 N. Y. 593.

The case of these policies is very much like that in *Baker v. Insurance Co.*, *supra*, where Judge Allen said the insurance was effected by the husband for the benefit of his wife, and as a provision for her in case of his death. It was there stated that the case would not be changed if the policy were regarded as having been procured by the wife, because the husband was in truth the actor, and represented the wife, and she, in claiming the benefits of the policy, necessarily ratified and confirmed the compact as it was made, and with all its terms and conditions. Therefore this case is to be looked at with reference to the fact that every dollar of the moneys which procured and

maintained these policies in existence belonged to the firm represented by the plaintiff, and that Gilman had no more right to invest or use these funds in the manner he did than would any third person who had procured them without any right or title. It has been said that the husband, when he procures an insurance for his wife's benefit, acts as her agent, or represents her, and that she has a vested interest in the policies the moment they are delivered by force of the statute permitting them to be made in this form. *Whitehead v. Insurance Co.*, 102 N. Y. 143, 6 N. E. Rep. 267. This is doubtless true in the case of the husband procuring the insurance with funds which belong to him or to his wife, but where the premiums are paid with moneys which in truth do not belong to him, and which the husband misapplies in so paying, and by which he violates his obligation to the true owner of the moneys thus used, the wife in such case must claim the policy subject to the means by which the husband procured it, and she must adopt all his methods. The moneys in the hands of the company could not be recovered back by the cestui que trust if received by the company in good faith, because it would stand in the position of a bona fide purchaser, yet the policy itself would stand as the representative of these trust moneys, and the right of the wife would be to that extent subordinate. This principle has, in effect, been decided in New Jersey in the case of *Shaler v. Trowbridge*, 28 N. J. Eq. 595. It was there held, upon almost identical facts, that there was no public policy which favored the wife at the expense of the principle that trust funds could be followed, and that no profit could in any way arise in favor of the trustee who used them. It also held that the wife could not be permitted to avail herself of the proceeds of policies paid for by her husband with trust funds. It is true in that case the policies were originally taken out in the name of the husband, and subsequently made payable to the wife, and it is urged that there is a difference in the two cases, because in the New Jersey case it was the husband's insurable interest which was insured, and then assigned, and that in this case it is the wife's interest which was originally insured; but we hold, upon the facts in this case, that the taking out of the policies in the name of the wife does not alter the principle as to trust funds. The cestui que trust is entitled

to follow his funds, and to take the moneys or the policy at his option.

The case of *Bank v. Hume*, 128 U. S. 195, 9 Sup. Ct. Rep. 41, is not in point. The moneys there used were in truth the property of the husband, although he was insolvent, and he used some of his property to purchase insurance for the benefit of his wife and children. The supreme court held that a policy of insurance taken out by the husband in the name and for the benefit of the wife made the contract a contract with the wife, and that, even though the premiums were paid by the insolvent husband, with moneys which, or some part of which, ought to have been used for the payment of his debts, yet, if there were no fraud as between the wife and the company, the wife could hold the policy as against the creditors of the husband, except the amount which had been wrongfully used in the payment of premiums. If the amount of the husband's estate used to pay premiums were no more than reasonable and moderate under the circumstances, it was further held that the creditors could not recover back the moneys so paid for them, although the husband was, at the time of their payment, insolvent. It was said the interest insured did not belong to the husband or his creditors; that the contracts were not payable to the husband, his representatives, or his creditor; that no fraud on the part of the wife, the children, or the insurance company was shown or pretended; and that there was no gift or transfer of the debtor's property, unless the amounts paid for premiums were to be held as excessive. That is a very different case from the one under consideration. It was no trust fund (within the meaning of that term when used to authorize the following thereof) which went to pay for the policy in that case. The moneys belonged to and were the property of the husband. They might, under certain circumstances, be reached in proceedings after judgment and return of execution, but the title was in the husband, and he used his own property to procure the insurance. Having done so, the policy thus procured became a contract with the wife, and her insurable interest in her husband's life was thus made effectual. The creditors could not follow the moneys into other property, and demand such property. No principle of following trust funds was involved.

In this case, however, there is the fact which alters and colors the whole transaction, and is fundamental and controlling in its nature, and that fact is that the moneys which procured the insurance were trust moneys, and, although invested in the policies, they were subject at the very moment of such investment to the right of the owner of the funds to follow them into whatever change of form they might assume, and to claim the thing into which they were changed as if it were the original fund. In the case in the federal court the whole matter was discussed with reference to the violation of the statute of Connecticut, based upon the statute of Elizabeth (13 Eliz. c. 5) prohibiting the transfer of the property of an individual in fraud of his creditors. We have a statute to the same effect, 2 Rev. St., p.137, §1. The learned chief justice said that the statute was passed to prevent debtors from dealing with their property to the prejudice of their creditors, but dealing with that which creditors irrespective of such dealing could not have touched was within neither the letter nor the spirit of the statute. This was spoken of the insurable interest of the wife, and it was spoken in regard to creditors as that term is generally used. In this case it is not in the simple character of a creditor of Mr. Gilman, or of the defendant Mrs. Gilman, that the plaintiff asks relief. He seeks the aid of a court of equity to enable him, in the character of a cestui que trust, to follow his property which was wrongfully converted by one bearing towards him the obligations of a trustee, and by such trustee invested in these policies, and such cestui que trust now asks, in substance, for his own property, or for the property into which his trust funds were wrongfully converted, and we think he has the right to recover the property which represents and stands in the place of the original trust fund. The case in the federal court is not at all parallel, and is, therefore, no authority against our contention. Whether at common law or under the provisions of our statute the procurement of policies of insurance in the wife's name, under the facts developed in this case, does not prevent the cestui que trust from following and claiming the trust funds or their proceeds. If the proceeds of these policies had been greater than the whole amount of the indebtedness of the husband to the cestui que trust, arising out of the husband's

breach of trust, we do not decide what might in equity be the different rights of the wife and such cestui que trust in the balance, or whether any different rule could be logically applied. The husband in this case converted over \$200,000 of what stood in the nature of a trust fund, and the plaintiff recovers only a little over one-fourth thereof in case the judgment on the referee's report be affirmed. We simply decide the case now before us. * * *

Creditor as the Insured.

AMICK v. BUTLER.

Supreme Court of Indiana, 1887. 111 Ind. 578, 12 N. E. 518.

MITCHELL, J. * * * This is a case in which a debtor, presumably at the solicitation of his creditor, effected an insurance on his own life for the benefit of his creditor, the latter being designated in the policy as the beneficiary, and agreeing to pay the expense of effecting the insurance, and of keeping the policy in force. It was also agreed that the debtor might at any time pay the debt, and reimburse the creditor for outlays in effecting and maintaining the insurance, and thereby entitle himself to an assignment of the policy. * * *

It was entirely at the option of the debtor whether or not he would reimburse the creditor for the sums expended in procuring the insurance. Whatever the creditor might have done in respect to the collection of his debt, it was beyond his power to compel the insured to reimburse him for his advances in procuring and maintaining the policy. The debtor had not agreed to repay advances voluntarily made. The advances having been made for the creditor's own benefit, he had no remedy against the debtor, or his legal representatives, to recover them. The rule in cases involving analogous principles is that where the owner of property vests the title absolutely in another, in pursuance of an agreement which gives the grantor the option to repurchase or not at his election, the transaction does not create a mortgage. *Voss v. Eller*, 109 Ind. 260, 10 N. E. Rep. 74; *Hays v. Carr*, 83 Ind. 275.

The right to the policy, and to the benefits to be derived therefrom, were absolute in the beneficiary until both the debt

and the advances were paid, even conceding that the oral agreement referred to would have been enforceable in the lifetime of the insured. The beneficiary in a life policy who has an insurable interest in the life of the insured at the inception of the policy may enforce payment for the full amount, notwithstanding the debtor on whose life it runs may have paid the debt. "Any interest sufficient to justify the insurance, and relieve it of the gambling aspect, will render it valid, and such policy will continue valid in the hands of a beneficiary or assignee, regardless of the cessation of interest, provided the facts show entire good faith and a sufficient justification." *Hine & N. Life Ins.* 82; *Olmsted v. Keyes*, supra; *Connecticut Mut., etc., Co. v. Schaefer*, supra. Perhaps owing to the particular nature of contracts, such as we are considering, if the debtor in his lifetime had tendered the amount of the debt and the advances, the claim of the legal representative might be supported. But, in the absence of an offer to comply with his agreement, we can discover no rational ground upon which the court can now compel the appellant to surrender money to which, according to every principle of law, he has a perfect title, and in which neither the debtor nor his representatives ever had any interest, legal or equitable.

A distinguishing element in the determination of cases of this character is whether the one whose life is insured so contracts himself to pay the premiums that an action could be maintained against him by the creditor for that amount. If such a contract is shown, then the policy is to be regarded as a collateral security, and the debtor is entitled to it upon the extinguishment of the principal debt; while, on the other hand, if the creditor pay the premiums, and the debtor is under no obligation to repay them, the right of the creditor is absolute. *Fremer v. Brade*, 2 De Gex & J. 582; *Knox v. Turner*, L. R. 5 Ch. 515; *Gottlieb v. Cranch*, 4 De Gex, M. & G. 440; *Godsal v. Webb*, 2 Keen 100. * * *

PART III

LEADING ILLUSTRATIVE CASES

PERSONS AND DOMESTIC RELATIONS

PARENT AND CHILD

CHAPTER I.

PARENT'S RIGHTS AND DUTIES.

Parent's Obligation to Support Child.

HUKE v. HUKE.

44 Mo. App. 308. 1891.

THOMPSON, J. This action is brought by a daughter, seventeen years of age, by her next friend, against her father for support and maintenance. The circuit court sustained a demurrer to the petition, and the plaintiff prosecutes this appeal. The petition is as follows:

"Your petitioner, Frieda Huke, by Thomas P. Bashaw, her next friend herein appointed, respectfully represents and shows: That petitioner is a resident of the city of St. Louis, state of Missouri, aged seventeen years, and the daughter of defendant, William Huke, by Amelia Huke, his wife, who died in said city of St. Louis on the thirteenth day of November, 1888; that continuously from her birth, until the date hereinafter mentioned, petitioner resided with and remained under the guardianship and control of her father, said William Huke, and dependent upon him for her support, for necessaries and for mental and moral training and education; that, on or about the first day of

July, 1890, petitioner's father, said William Huke, forcibly by commands, threats and duress, compelled petitioner to depart from and to leave his house and home without money or means or provision for her subsistence, and has continuously since failed, neglected and refused to resume exercise or perform any of his duties as her parent and natural and legal guardian, and has utterly and wholly renounced and abandoned all his said duties, and has failed, neglected and refused to make provision, or to supply any money or means, for petitioner's care, custody and guardianship, for her support, for her necessities, or for her mental and moral training and education; that for many years last past defendant, William Huke, has been, and is, the owner of a large amount of property, and engaged in prosecuting an extensive and profitable business in said city of St. Louis, and possessed of a large income, and is well able financially to make provision for petitioner's needs in the premises; that petitioner is wholly destitute, has no funds, property or resources of any kind, that by reason of her youth, sex and lack of education and experience, she has been and is unable to secure employment or to earn the means of subsistence; that she is without a home, and that she has no abiding place, food or raiment, save such as are bestowed upon her in friendship and charity; that she is without means or provision, or hope of obtaining same, for the furtherance of her mental and moral training and education; that, for her relief, she has incurred debts and obligations beyond her capacity to pay, and her credit is now exhausted; that the petitioner is wholly without hope or prospect of relief, and without remedy at law, or any remedy whatsoever, save through the intervention of this honorable court in enforcing against her father, said William Huke, petitioner's right to a just, adequate and suitable provision for her wants in the premises. Wherefore, petitioner, by Thomas P. Bashaw, her next friend aforesaid, prays this honorable court to grant herein its order and command to said William Huke, requiring and directing him to appear before this court at a time in said order to be stated, then and there to show cause, if any there be, why he should not be ordered, directed and required by this honorable court to furnish and pay over, pendente lite, and from time to time, the necessary funds and means for the supplying of petitioner's wants in the premises during the remainder of her minority,

and for her necessary cost and expenses herein, and further to show cause, why this honorable court should not appoint in that behalf a suitable person to act under the orders and direction of the court as petitioner's acting guardian in the premises; and petitioner further prays the court, through Thomas P. Bashaw, her next friend aforesaid, that upon the return to said order, and upon the final hearing hereof, this honorable court may by order and decree herein order, direct and require said William Huke to furnish and pay over, *pendente lite*, and from time to time, the necessary funds and means for the supplying of petitioner's wants in the premises during the remainder of her minority for her support, for necessities, mental and moral training and education, for her costs and expenses herein, and that this honorable court may, for the accomplishment of such purposes, nominate and appoint a suitable person to act *pendente lite*, and until petitioner attains her majority, under the orders and direction of this honorable court, in receiving such funds and means from said William Huke, and applying same for the purposes aforesaid for the benefit of petitioner, and for such other and further relief as may seem meet and proper and within the powers of this honorable court."

This action proceeds in the face of elementary principles. By the common law of England a father is bound to support his infant child in the sense that the obligation has any legal sanction; no action can be maintained against him, without the aid of statute, to compel him to discharge this natural duty. By that law a father is not liable as upon an implied contract, to a stranger who furnishes necessities for the support of his infant child. *Urmston v. Newcomen*, 4 Ad. & El. 899; *Mortimore v. Wright*, 6 Mees. & W. 482; *Seaborne v. Maddy*, 9 Car. & P. 497; *Hodges v. Hodges*, Peake, Ad. Cas. 79. On this point many of the American courts follow the English rule, but some of them have departed from it and adopted the more humane principle, that the moral obligation of the father to support his infant child is sufficient to raise an implied promise to pay for necessities furnished to a child by a stranger. See, for instance, *Gotts v. Clark*, 78 Ill. 229; *Hunt v. Thompson*, 3 Scam. (Ill.) 179; 36 Am. Dec. 588. I have looked through our Missouri cases without satisfying myself what the state of our law is on this question of the father's liability for necessities. But the

intimations of those cases are such that we may concede that, under our law, a father is liable to a stranger for necessaries furnished to his infant child. *Rogers v. Turner*, 59 Mo. 116; *St. Ferdinand Academy v. Bobb*, 52 Mo. 357; *Girls' Home v. Fritchey*, 10 Mo. App. 344. And yet it does not follow that such an action as the present will lie.

No instance is found in the books, where such an action as the present has been maintained, either at law or in equity. At one period in our English history a statute was enacted that, if any popish parent should refuse to allow his Protestant child a fitting maintenance, with a view to compel him to change his religion, the lord chancellor should, by order of the court, constrain him to do what is just and reasonable. Stat. 11 & 12 Wm. III, c. 4. The very enactment of this statute,—the necessity in the state of the law for such a statute,—shows that a father was under no compulsory obligation at common law, or by the principles of equity, to support his infant child. A case arose after the passing of this statute, making this conclusion still more clear. The daughter of a wealthy Jew had embraced christianity, and he turned her out of doors. On the petition of the parish for relief against him, they were held entitled to none, because it was not alleged that she was poor or likely to become chargeable. *Inhabitants of St. Andrews Parish v. Mendzes de Breta*, 1 Ld. Raym. 699. This gave occasion for another statute, which ordained that, if Jewish parents should refuse to allow their Protestant children a fitting maintenance, suitable to the fortune of the parents, the lord chancellor, on complaint, might make such order as he should see proper. Stat. 1 Anne, c. 30; 1 Bla. Com. 449.

But it is suggested, in argument, that this petition is addressed to the chancery powers of the circuit court, and that the chancellor of England had, in virtue of a delegated authority from the king as *parens patriae*, or, as was sometimes said, the father of the fatherless, a power to require a father, having the means, to set apart a fund for the support of his indigent minor child. That court has again and again asserted a species of vice-regal power over the custody and education of children, in virtue of a delegated authority from the king as *parens patriae*. But the extent to which the court has gone in the exercise of this power has been to make orders disposing of the custody of infant

children, and directing a scheme of education out of their own property, when they had property out of which such a scheme could be directed. At one time there was considerable opinion to the effect, that the jurisdiction of chancery in this regard rested upon property; and, therefore, it was a common practice for some relative of a child, desiring to obtain an order of chancery, taking the child away from the father for misconduct of the latter, to settle upon the child a certain amount of property. But it was finally settled that the jurisdiction did not rest on property, *In re Spence*, 2 Phil. 247; *In re Flynn*, 2 De Gex & Sm. 457, 481; though the chancellors often refused to exercise it in cases where the infant had no property, because, without the aid of property, it could not be conveniently and beneficially exercised. *In re Flynn*, *supra*.

In the exercise of that jurisdiction it will appear that the English court of chancery went so far as to level orders and decrees against parents and guardians residing in foreign countries—in France and America, and that it stood ready to enforce those decrees by imprisoning the defendants in the Fleet, whenever they should set their feet upon the soil in England—a jurisdiction which, it may be assumed, no American court would dare to exercise. But, while thus attempting a tyrannical and extra-territorial jurisdiction against parents, no court of chancery in England ever made an order requiring a father, however wealthy, to set apart out of his own estate a fund for the maintenance and education of his infant child, or even to provide sustenance for such child. The common law of England has, from the earliest times, left this duty to the natural feelings of the parents, and experience has shown that the confidence has not in general been misplaced. If distressing circumstances to the contrary sometimes arise, the most that can be said is that they illustrate a profound defect in the common law. The court cannot remedy this defect, for the courts have no legislative power. Arguments, addressed to us upon the reason and humanity of the rule which would sustain this action, are vain. They are addressed to a tribunal which has no jurisdiction to change the law of the land.

We have been referred to the case of *Cowls v. Cowls*, 8 Ill. 435, 44 Am. Dec. 708, in which the court sustained an action by a divorced wife against her husband for the maintenance of the

children of the marriage. Without reference to the ground on which the relief was put, it is sufficient to say that it is no authority for the present action. The action was brought by a wife, who had been divorced, against her late husband, and it may be assumed that the court still possessed jurisdiction over the subject of alimony and maintenance. But, whatever may be said of the ground on which that case proceeded, we are obliged to say that a single decision cannot change a rule of the common law which has been settled for ages.

The view which we take of this petition renders it unnecessary to consider whether, in view of the jurisdiction over the guardianship of minors, which our statutes have vested in the courts of probate, such a jurisdiction as is here invoked could be held to exist in the circuit courts in any event.

The judgment will be affirmed. All the judges concur.

Emancipation—Marriage.

WHITE v. HENRY.

24 Me. 531. 1845.

Assumpsit to recover the wages of a minor son of the plaintiff for the term of three months and twenty days, commencing on Oct. 28, 1843, as a seaman on board a vessel belonging to the defendants.

The services were performed, and the defendants proved payment therefor to the son, and contended that this was a discharge from the father.

The defendants at the time of making the contract, knew that the son was under age. The plaintiff did not know of the intention of the son to go to sea, nor of his having shipped until after he had sailed. The plaintiff had always supplied his son with the means of support so long as he would stay with him. The son was married in 1842, against his father's wishes, and without his consent, and contrary to his direction, having gone secretly into the State of Connecticut for that purpose, because his father would not permit him to marry here. The plaintiff has never expressly or impliedly given his assent to the marriage, but has always been ready and willing to support his

son in a manner becoming his degree and station in life. The son, however, has declined to live with his father, and has lived with his wife, having no children, when not at sea.

If the plaintiff was entitled to recover, the defendants were to be defaulted, and judgment was to be entered for the amount of the wages, at fourteen dollars per month; and if not, the plaintiff was to become nonsuit.

TENNY, J. It is a general principle well settled, that parents are under obligation to support their minor children, and that they are entitled to their earnings. When a contract between the parent and child exists, that the latter shall enjoy the fruit of his labors; or when the parent neglects to support him, the rule will not apply. If the father, or person having the care and control of the minor, should consent to his marriage, this may be another exception to the principle, so far as his earnings are necessary for the support of his wife and children; for the consent to the marriage may imply a consent that he should, from his earnings, have the means of discharging his new obligations.

The statute requires, that when a male, under the age of twenty-one years is to be married, the consent of the parent, guardian, or other person having the care or government of such party within the State, shall be obtained before marriage. Rev. St. c. 87, § 7. We cannot believe that the violation of an express provision of law, can secure to a minor, who is guilty thereof, a privilege, which he would not otherwise possess, and constitute another exception to the general law.

If the son is not entitled to his earnings, a payment to him of their value by his employer (without the consent of the father, express, or implied), knowing his minority, cannot deprive the father of the right to recover a just compensation for the labor, of which he has been deprived without his own fault or neglect.

The case at bar finds, that the son, whose wages are claimed in this action, refused to live with his father, who provided every thing necessary for his comfort and convenience. He went away without the knowledge, and married against the will and express direction, of his father. The father has in no way consented that he should have his earnings, but has always been ready and willing to support him in a manner becoming his degree and station in life. The defendants, knowing that he was a minor,

without the knowledge or consent of his father, employed him as a seaman, and have paid him his wages in full.

To allow this defence to prevail would hold out encouragement to sons, impatient of parental control, while in their minority, to resist the reasonable authority of their fathers, and give the latter little means to secure their own legal rights beyond the exercise of physical restraint; would offer inducements to youth to enter into improvident and ill-advised marriages, which maturer years would cause them to regret and deplore.

It is insisted that the defendants were authorized to suppose, that the son's marriage was by the father's consent. The father could not be deprived of that, which was his own, when no negligence was imputable to him, and the defendants by the knowledge of the son's minority, could have informed themselves of the facts before they made payment to him.

Defendants to be defaulted, and judgment to be entered at the rate of \$14 a month for the time the son was employed, and interest from the date of the writ.

CHAPTER II.

SPECIAL RELATIONSHIPS—TORTS.

Parent's Liability to Third Persons for Child's Tort.

HOVERSON v. NOKER.

60 Wis. 511. 1884.

TAYLOR, J. It will be seen by examination of the record that it became important for the plaintiffs to connect the father with the acts of his young sons, which the plaintiffs allege caused the injury complained of, and for this purpose the plaintiffs offered evidence tending to prove that the sons had frequently, before the day upon which the accident happened, called abusive names, shouted, and frequently discharged fire-arms when persons were passing the house of the defendants, and that this was often done in the presence of their father. All evidence of this kind was excluded. This, we are inclined to hold, was error. If the father permitted his young sons to shout, use abusive language, and discharge fire-arms at persons who were passing along the highway in front of his house, he permitted that to be done upon his premises which, in its nature, was likely to result in damage to those passing, and when an injury did happen from that cause he was not only morally but legally responsible for the damage done. If a parent permits his very young children to become a source of damage to those who pass the highway in front of his house, he is as much liable for the injury as though he permitted them to erect some frightful or dangerous object near the highway which would frighten passing teams; and in such case he cannot screen himself by saying that he did not in words order the erection to be made. If he made it himself, with the intention to frighten passing teams, he would be responsible for the injury caused by it; and when he permits his irresponsible children to do it he is equally liable, because he has the control of his premises as well as of the

children, and is bound to restrain them from causing a dangerous thing to be erected on his premises near the highway; and permitting his young sons to become an object of fright to teams passing, is certainly equally, if not more reprehensible than permitting an inanimate structure to be placed where it would cause such fright. We think the evidence ought to have been admitted in order to connect the father with the acts of the young sons which caused the injury when the plaintiffs were on their way to church in the morning, as well as when on their return from the church in the afternoon.

THE INFANT

CHAPTER III.

THE LAW RELATING TO THE PERIOD OF INFANCY AND TO MAJORITY.

When an Infant Attains Majority.

STATE v. CLARK.

3 Harr. 557 (Del.). 1840.

The defendant was presented by the grand jury for illegal voting at the late inspector's election.

The presentment set forth these facts, to wit:—That the defendant was born on the 7th of October, A. D. 1819, and voted at the election held on the 6th of October, 1840, upon age. In his behalf a motion was now made to quash the presentment on the ground that it appeared from the face of it that the defendant was of full age at the time he voted, and was, therefore, not guilty.

BAYARD, C. J. Many persons suppose that the expression in the Constitution relative to the qualifications of voters is, that citizens between the ages of twenty-one and twenty-two years shall be entitled to vote without paying tax; and on this the common, but erroneous notion is, that a man must be in point of fact actually within his twenty-second year before he can vote. The premises and conclusion are both wrong. "Every free white male citizen of the age of twenty-one years, and under the age of twenty-two years, having resided as aforesaid, shall be entitled to vote without payment of any tax." (Const., art. 4, § 1.) To ascertain when a man is legally "of the age of twenty-one years," we must have reference to the common law, and

those legal decisions which from time immemorial have settled this matter, in reference to all the important affairs of life.

When can a person make a valid will; when can he execute a deed for land; when make any contract or do any act which a man may do, and an infant, that is, a person under the age of twenty-one years, cannot do? On this question the law is well settled; it admits of no doubt. A person is "of the age of twenty-one years" the day before the twenty-first anniversary of his birthday.

It is not necessary that he shall have entered upon his birthday, or he would be more than twenty-one years old. He is, therefore, of age the day before the anniversary of his birth; and, as the law takes no notice of fractions of a day, he is necessarily of age the whole of the day before his twenty-first birthday; and upon any and every moment of that day may do any act which any man may lawfully do. 1 Chit. Gen. Prac. 766. "It is to be observed that a person becomes of age on the first instant of the last day of the twenty-first year *next before* the anniversary of his birth; thus, if a person were born at any hour on the first of January, A. D. 1801 (even a few minutes before twelve o'clock on the night of that day), he would be of full age at the first instant of the 31st of December, A. D. 1821, although nearly forty-eight hours before he had actually attained the full age of twenty-one, according to years, days, hours, and minutes; because there is not in law in this respect any fraction of a day; and it is the same whether a thing is done upon one moment of the day or another."

On the face, then, of this presentment, it appears that Mr. Clark was entitled to vote on the 6th of October, being on that day of the age of twenty-one years; and the presentment, showing no offence, must be quashed.

CHAPTER IV.

INFANT'S CONTRACTS AND CONVEYANCES.

Division I.—Where the Adult Takes the Initiative.

Ratification—What Constitutes Ratification.

BOYDEN v. BOYDEN.

9 Met. 519 (Mass.). 1845.

Assumpsit for goods sold and delivered, and on the money counts. Writ dated March 2d, 1843. At the trial in the court of common pleas, before Williams, C. J., the plaintiff gave in evidence a promissory note for \$44, given to him by the defendants on the 12th of April, 1838. The defense was infancy; and the defendants introduced evidence tending to prove that one of them was born February 9th, 1818, and the other August 11th, 1819. There was also evidence tending to prove that the said note was given for a horse and plough, bought of the plaintiff by the defendants; and that they kept the said horse and used him, about a year after buying him, and then exchanged him for another horse. There was no evidence that the defendants had disposed of the said plough, or that they, or either of them, ever offered to restore the said horse or plough to the plaintiff, or ever, in any way, gave notice of their intention to rescind and avoid their said contract.

The judge instructed the jury, that if the defendants retained the property, for which the note was given, in their own hands, and used it for their own purposes, for an unreasonable time, after arriving at the age of twenty-one years, without restoring it to the plaintiff, or giving him notice of their intention to avoid the contract, it operated as a ratification of said contract, and rendered the defendants liable in this action. The jury returned a verdict for the plaintiff, and the defendants alleged exceptions to said instructions.

SHAW, C. J. The questions as to what contracts of an infant are void, and what voidable, and, in the later case, what shall be deemed a disaffirmance, and what a ratification, are questions which have been much discussed, and in respect to which there are conflicting authorities. It is not my intention now to review them. Some points seem to be well settled.

If a minor gives a written promise for the purchase money for goods sold to him by an adult person, the contract is voidable and not void, and may be ratified by the infant, after coming of age. *Whitney v. Dutch*, 14 Mass. 457, 7 Am. Dec. 229. It is also well settled, that it is the privilege of the minor only to disaffirm the contract, and, until he does so, the other party is bound by it. The minor, when of age, may regard it as beneficial, and choose to affirm it. But if he elects to disaffirm it, he annuls it on both sides, *ab initio*, and the parties revert to the same situation as if the contract had not been made. If the minor refuses to pay the price, as he may, the contract of sale is annulled, and the goods revert in the vendor. *Badger v. Phinney*, 15 Mass. 359, 8 Am. Dec. 105. But until some notice given by the purchaser, after coming of age, of his purpose to annul the contract, or some significant act done, the vendor cannot reclaim his property, and his taking of it would be a trespass. If, therefore, the minor purchaser, after coming of age, retains the specific property, treating it as his own, when it is in a condition to be restored, and it is of any value, and if, for an unreasonable time, he neglects to restore it, or to tender it, or give notice of his readiness to restore it, according to the circumstances of the property and of the parties, it manifests his determination to keep the property and affirm the contract. And further; if, after coming of age, he retains the property for his own use, or sells or otherwise disposes of it, such detention, use or disposition—which can be conscientiously done only on the assumption that the contract of sale was a valid one, and by it the property became his own—is evidence of an intention to affirm the contract, from which a ratification may be inferred. In the present case, the defendants retained the plough, one of the articles for which the note was given, between two and three years after they both came of age. Whether, if the contract had been rightfully disaffirmed, the vendor could have reclaimed the horse received by the defendants, in exchange for the one sold,

after one of the defendants came of age, but not the other, we give no opinion. Retaining the plough brings the case within the principle. The court are of the opinion that the directions of the judge at the trial were right, and well adapted to the case presented by the evidence. See *Boody v. McKenney*, 23 Me. 517.

Exceptions overruled.

Necessaries.

McCRILLIS v. HOW.

(Superior Court of Judicature of New Hampshire, 1826.)

3 N. H. 348.

Assumpsit upon a note, dated February 21, 1823, for \$21.92, made by the defendant and payable to the plaintiff or order. There was also a count upon an account for medicines and visits, as a physician, amounting to \$21.92.

The cause was submitted to the decision of the court, upon the following facts. The plaintiff did the services and furnished the medicines, mentioned in the second count; but at the time, the defendant was an infant under the age of twenty-one years. The services so rendered, and the medicines so delivered, were necessary and proper for the defendant. On the 21st February, 1823, the defendant gave to the plaintiff the note, mentioned in the first count, to balance said account; and the plaintiff did balance the account upon his book by giving credit for the said note. At the time the said note was given, the defendant was an infant, under the age of twenty-one years.

BY THE COURT. It has long been settled, that no action can be maintained against an infant, upon a promissory note. The reason assigned is, because, if the note was held to be valid, the infant would, when the note was in the hands of a bona fide endorsee, be precluded from disputing the original debt. *Chitt. on Bills*, 24; 1 D. & E. 40, *Freeman v. Hurst*; 3 *Caines* 323 (N. Y.), *Van Winkle v. Mitcham*; 10 *Johns.* 33 (N. Y.), *Swazey v. Adm'r of Vanderheyden*; 2 *Starkie* 36, *Ingledew v. Douglas*; *Campbell* 552, *Williamson v. Watts*; *Carthew* 160, *Williams v. Harrison et al.*

The plaintiff, then, cannot recover upon his first count. But

we see no objection to a judgment in his favor, on the second count. A void note, given to balance an account, is no satisfaction. 2 Johns. (N. Y.) 455, 3 Am. Dec. 446, Markle v. Hatfield; 1 Esp. N. P. R. 5; 6 D. & E. 52, Puckford v. Maxwell; 3 Brod. & Bing. 295; 7 Taunton 312, Hickling v. Hardy; 4 East 147.

Judgment for the plaintiff.

Division II.—Where the Infant Takes the Initiative.

Where the Infant Disaffirms and Then Seeks to Recover Consideration He Paid Adult—Right to Recover—Where Infant Received Consideration—Before Majority.

STAFFORD v. ROOF.

9 Cow. 626 (N. Y.). 1827.

Trover for a horse. On the trial it appeared that the plaintiff while an infant sold the horse to the defendant. The defendant paid the price and the plaintiff was still an infant.

The defendant moved for a nonsuit on the ground, among others, that it was not competent for the plaintiff below to avoid his contract while yet under age. The motion was overruled. The court charged that the plaintiff below had a right to bring his action while yet an infant. To this ruling and charge the defendant excepted. Verdict and judgment for the plaintiff. The defendant brought error to the Supreme Court, which reversed the judgment on the sole ground that an infant cannot avoid his executed contract during his minority. Error was brought to the Court for the Correction of Errors.

JONES, CHANCELLOR, said: It is true in general that the deed of an infant is voidable merely, when delivered with his own hand, and is of equal validity, whether it be of lands or chattels. Some of the old writers seem to make a distinction between deeds and other contracts of infants accompanied by manual delivery; but the distinction is now discarded, and the same effect is given to both. They are not void, but voidable, where any act of delivery is done by the infant calculated to carry an estate; and this whether the contract be beneficial to

the infant or not. But a manual delivery seems in such case to be essential. None was shown in this case. The fact of possession by the vendee would be evidence of delivery in the case of an adult; but in case of an infant vendor, there should be strict proof of a personal delivery. An infant cannot make an attorney. The appointment would be void; and there being no proof of actual manual delivery, the contract would seem to be void. The agreement to sell conferred no right upon the vendee to take. The mere agreement of the infant to sell would not protect the vendee against an action of trespass for taking the horse. The taking would be tortious; and in itself a conversion.

But suppose the sale to be merely voidable; could the infant or his guardian avoid it before he arrived at 21 years of age? The general rule is, that an infant cannot avoid his contract executed by himself, and which is therefore voidable only, while he is within age. He lacks legal discretion to do the act of avoidance. But this rule must be taken with the distinction that the delay shall not work unavoidable prejudice to the infant; or the object of his privilege, which is intended for his protection, would not be answered. When applied to a sale of his property, it must be his land; a case in which he may enter and receive the profits until the power of finally avoiding shall arrive; and such was the doctrine of *Zouch v. Parsons*, 3 Burr. 1794. Should the law extend the same doctrine to sales of his personal estate, it would evidently expose him to great loss in many cases; and we shall act up to the principle of protection much more effectually by allowing him to rescind while under age, though he may sometimes misjudge, and avoid a contract which is for his own benefit. The true rule, then, appears to me to be this: that where the infant can enter, and hold the subject of the sale till his legal age, he shall be incapable of avoiding till that time; but where the possession is changed, and there is no legal means to regain and hold it in the meantime, the infant, or his guardian for him, has the right to exercise the power of rescission immediately. Now the common law gives no action or other means by which the mere possession of personal property can be reclaimed, and held subject to the right of avoidance.

Beside, in this case the infant had a general guardian. It may well be doubted whether he could make any contract of

sale which should bind him, for any purpose, during his wardship.

(Other opinions omitted.)

By a majority vote the judgment of the Supreme Court was reversed.

EDGERTON v. WOLF.

6 Gray 453 (Mass.). 1856.

Tort for the conversion of a horse. At the trial it appeared that the defendant Wolf was a minor, and after purchasing the horse from the plaintiff had returned it to the plaintiff, and had thereafter taken the horse from the plaintiff and sold it. The other defendant, Crafts, subsequently had possession of the horse. The sale by the infant and the possession of Crafts, were the acts of conversion complained of.

The defendants contended that if the sale from the plaintiff to Wolf was absolute it vested the property in Wolf, and a re-sale or return of it by him to the plaintiff, even if voluntarily made, was a voidable act and was avoided by Wolf's re-taking the property and selling it. But the court refused so to rule and instructed the jury "that, if Wolf had the property of the plaintiff, and afterwards voluntarily returned it to him, intending to give up all his interests in it to him, and the plaintiff accepted and took possession of the property, such surrender would restore the title to the plaintiff, and the plaintiff could not afterwards lawfully retake the property and sell it." The defendant excepted to the charge and the jury returned a verdict for the plaintiff.

DEWEY, J. (after deciding other questions, continued:) The remaining exception is to the ruling of the court that, if Wolf received the property of the plaintiff under a contract of sale, but afterwards voluntarily returned it to the plaintiff, intending to give up all his interest in it, and the plaintiff accepted it, such surrender would restore the title to the plaintiff, and Wolf could not afterwards lawfully retake the property and sell it. Looking at the precise state of facts as developed in this case, we have no doubt of the correctness of the ruling. Wolf, a minor, had, as he alleged, bought the horse of

the plaintiff, but the contract was that of a minor, and so voidable at his election. This he might do as well against as with the consent of the plaintiff. The case finds that he did thus voluntarily return the horse to the plaintiff, intending to give up all his interest in the property. The case is none the worse for the plaintiff, because he assented to this act of avoidance and return of the property by Wolf. The sale, which was voidable, was thus avoided by the infant, and all the rights of the vendor reverted in him. Wolf had thus effectually availed himself of any privilege which attached to his minority, and the contract was no longer in force. With the surrender of the property to the plaintiff, intending to give up all his interest in it, he ceased to have any right over the property, and could not retake the same against the will of the plaintiff.

Exceptions overruled as to Wolf.

Disaffirmance—After Majority—Where He Still Has the Consideration.

WALLACE v. LEROY.

57 W. Va. 263, 50 S. E. 243, 110 Am. St. Rep. 777. 1905.

POFFENBARGER, J. This case is governed by legal principles applicable to contracts made by persons affected by the disability of infancy. Charles Leroy, an orphan boy, dependent upon his own resources for a living, owned and managed a cigar stand in the Florentine Hotel, at Huntington, W. Va., prior to May 29, 1902, and became indebted to a number of persons and firms for cigars, board, rent, and other things. Having become embarrassed, he gave his creditors worthless checks, moved part of his stock into the basement of an adjoining building, prepared to leave the city, and, on the day above named, sold all his stock of goods to A. A. Hanly, and departed. Geo. S. Wallace, an attorney to whom several claims against Leroy, amounting to nearly \$300, had been delivered for collection, took assignments of them, and, on the day of the sale to Hanly, instituted an action against Leroy before a justice of the peace, in which an attachment was sued out, and copies thereof served on Hanly and other persons who were supposed to be indebted to the

defendant, or to have property in their hands belonging to him. Hanly answered, admitting indebtedness on account of the purchase money of the property, amounting to \$371.73. The defendant appeared by guardian ad litem, and set up his infancy, among other defenses. A jury was waived and the justice rendered a judgment in favor of the plaintiff for \$269.72, and ordered the garnishee to pay the same, together with the costs, out of the money so due from him. In a trial de novo by a jury in the circuit court on appeal, a demurrer to the evidence was sustained by the court, and a judgment of nihil capiat entered.

* * * * *

The effect of the establishment of the fact of infancy depends upon the forum in which it is set up, the right in controversy, the time at which the benefit of it is claimed, and other conditions. Since the rules, principles, and processes of courts of equity are in many respects essentially different from those applied in courts of law, a party asserting rights to which he is entitled by reason of the disability of infancy may, in equity, be compelled to submit to conditions unknown to the common-law courts. As a condition of obtaining relief, he may be required to do equity, or to come into court with clean hands. For principles governing the procedure in equity in such cases, some of which are not applicable here—this being an action at law—see *Mustard v. Wohlford's Heirs*, 15 Grat. 329, 76 Am. Dec. 209; *Bedinger v. Wharton*, 27 Grat. 857; *Gillispie v. Bailey*, 12 W. Va. 92, 29 Am. Rep. 445.

Nor is this a possessory action by the infant to recover back specific property sold or bartered away by him. In such case he seeks to undo an executed contract, and to set up title to property, and many cases hold that he must return the money, or the property he received in exchange for it, if he is able to do so. 1 Min. Ins. 525; *Taft v. Pike*, 14 Vt. 405, 39 Am. Dec. 228; *Weed v. Beebe*, 21 Vt. 495; *Kitchen v. Lee*, 11 Paige (N. Y.) 107, 42 Am. Dec. 101; *Price v. Furman*, 27 Vt. 268, 65 Am. Dec. 194; *Boody v. McKenney*, 23 Me. 517; *Manning v. Johnson*, 26 Ala. 446, 62 Am. Dec. 737. What acts of disaffirmance would be sufficient to revest the title in him need not be indicated here.

Many of the reported cases present instances of disaffirmance by infants after having attained their majorities, in which it is

necessary to determine whether there has been a ratification. Aside from the question of ratification, this is important where the contract was one of sale of the infant's land, for it is said he cannot disaffirm such sale before he reaches maturity, since it requires as much discretion and judgment to rescind as to make a contract. 1 Min. Ins. 523. But he may have possession of the land against his contract while under age.

This is a mere personal contract whereby the infant has obligated himself to pay money, and which he repudiates while under age. Though executed on the part of the plaintiff's assignors, it is executory on his part. He is not seeking to recover either property or money, but simply defending against a demand for money. To avail himself of this defense, he need not return or offer to return what he has received. *Weed v. Beebe*, 21 Vt. 495; *Fitts v. Hall*, 9 N. H. 441; *Burley v. Russell*, 10 N. H. 184, 34 Am. Dec. 146; *Aldrich v. Grimes*, 10 N. H. 194; *Badger v. Phinney*, 15 Mass. 359, 8 Am. Dec. 105. However, the legal effect of the plea, sustained by proof, is to annul the contract, and revest in the assignors or plaintiff, as against the defendant, the title to the property they sold him. If he has any of it, they may recover it from him by any proper possessory remedy. 1 Min. Inst. 524; 16 Am. & Eng. Ency. Law, 294; *Badger v. Phinney*, 15 Mass. 359, 8 Am. Dec. 105; *Nolan v. Jones*, 53 Iowa, 387, 5 N. W. 572; *Strain v. Wright*, 7 Ga. 568; *Brantley v. Wolf*, 60 Miss. 420; *Evans v. Morgan*, 69 Miss. 328, 12 South. 270. This confers upon the party who made the sale to the infant a right to reclaim his property, which is essentially different from the right to recover damages for breach of a contract. There must be restoration, but not by tender or return of the property at or before pleading infancy against the money demand. It follows as a legal consequence, to be enforced by a separate, subsequent, appropriate proceeding.

The foregoing propositions are subject, however, to the qualification that infancy is no defense to an action for the purchase money of articles furnished to an infant which are necessary to his subsistence and comfort, and to enable him to live according to his real position in society. * * *

The application of these principles makes it impossible to sustain the view taken by counsel for the plaintiff in error as

to any part of the demand, except the one for board. He is unable to establish a debt against the defendant. This is admitted. What its effect upon the title to the property in the hands of the purchaser from the defendant may be is a question not now presented for adjudication. This action is not to recover that property or its proceeds in the hands of the purchaser as the property of the plaintiff, but to obtain a personal judgment against the defendant, to the discharge and satisfaction of which the purchase money is sought to be appropriated by means of the garnishment, which is in the nature of an execution for the enforcement of satisfaction of a judgment out of the defendant's property. By his disaffirmance of the contract, the basis for a judgment against him has failed. What remains is a mere right to follow up property, which can no more constitute ground for a personal judgment than did the contract itself, after the defense of infancy has been made out. By allowing a personal judgment on that ground, the court would virtually make and enforce a new contract of sale between the parties. Escape from this logical result is attempted by saying the case is analogous to a proceeding against a non-resident, in which, although no personal judgment can be taken except upon appearance, the defendant's property may nevertheless be subjected to sale for satisfaction of the debt. But the cases cannot be assimilated. In an attachment against a nonresident proceeded against by order of publication, and not appearing, it must be shown, *prima facie*, that there is a debt due from the defendant to the plaintiff, and that the attached property belongs to the former. Both of these conditions are wanting in the case now under consideration.

Moreover, it was the right of action arising out of the contract, and no other, that the plaintiff acquired by the assignment. If the property obtained by the defendant under the contract still remained in his hands, it would be the subject of an independent action for its recovery; and, if any part of the proceeds of that property remaining in the hands of the garnishee can be recovered, it also gives rise to a cause of action distinct from, and independent of, that arising from the contract, to which the plaintiff had not shown himself entitled by any assignment. It is a right to follow up and reclaim the plaintiff's own property, not a right of action for damages

consequent upon a breach of contract. What then in this case, except the claim for board, can afford a shadow of basis for recovery? Absolutely nothing. As there can be no judgment against the defendant, the attachment must wholly fail. There is nothing to be satisfied. There being no debt, there can be no attachment to seize and hold the property of the defendant to satisfy a debt.

Counsel for plaintiff in error rely upon *Evans v. Morgan*, 69 Miss 328, 12 South. 270, to sustain their contention, but upon examination it is found to be exactly contrary thereto. An infant engaged in merchandising, became indebted, and then made a fraudulent sale of his stock of goods to his father. In an action at law he set up, and defeated his creditors by, his plea of infancy. They then brought a suit in equity to set aside the sale and subject the property to the payment of their debt. Although unable to identify their property, the court held that they were entitled to have satisfaction out of the proceeds of the property, because the proof showed that it had been so mingled by the defendant with other property as to destroy its identity. While the creditors in that case were thus permitted to resort to the property for their satisfaction, their remedy was entirely different, not only as to the forum, but also in its nature. It proceeded upon the theory that the contract had been abrogated, and the creditors were following up and recovering their property, and not merely seeking to enforce the contract.

(The judgment of the lower court was reversed as to the item of \$13.24, the claim for board.)

When the Right to Disaffirm After Majority Must Be Exercised.

PROUT v. WILEY.

28 Mich. 164. 1873.

CHRISTIANCY, C. J. This was a bill to remove a cloud from the complainant's title to one hundred and sixty acres of land in Ingham county. The title, and the facts affecting it, as shown by the evidence, were as follows: Cornelius Cadwell,

being then a minor, purchased the land at the United States Land Office, December 23, 1848, and on the 5th day of October, 1850, while still a minor (and only twenty years old in July of that year), sold and conveyed the land to George A. Wallace, for the consideration of one hundred and twenty-five dollars.

* * * Shortly after the execution of the deed, in the spring of 1851, and while yet a minor, Cadwell left the state and went to California, and thence to Central America, and did not return to this state until the latter part of August, 1857. In the meantime, Wallace, on the 28th day of October, 1850, conveyed the land to one Phoebe Ann Skidmore, who, on the 14th of September, 1853, conveyed the same to one Charles Koegel, who was in possession of the land when Cadwell returned from Central America in 1857. In November, 1857, Cadwell, then living in Washtenaw county, some eighteen or twenty miles from the land, went and saw Koegel, informed him that at the time he made the deed to Wallace he was a minor, and that the deed was not good; but offered to give him a deed for seventy-five dollars in money. Koegel offered to pay him that amount in stock, which Cadwell refused, and Koegel said he would have the money the next May. Cadwell again called upon Koegel the next May for the money; but Koegel then refused to do any thing about it, claiming that his title was good, whereupon Cadwell, as he testifies, caused a notice of ejectment to be served upon Koegel. Nothing further, however, appears then to have been done. In the winter of 1859 or 1860 Cadwell went and resided at Leroy in Ingham county, within two miles of the land, where he seems to have resided till the latter part of 1864 or the spring of 1865, when he removed to Williamston, in Ingham county, whence, in the spring of 1865, he was drafted into the army, and returned in September, 1865.

Sometime between 1857 and 1865 (the exact date does not appear), Koegel died, leaving, as we infer from the evidence, a tenant in possession, who had gone in previous to his death. While Cadwell was in the army he was informed that this tenant had left the land and the premises were vacant, and he thereupon authorized one Lewis Haviland, the son of Lewis J. Haviland, next mentioned, to take possession of the land for him; which he did, and continued in possession until June 1st, 1865, when Cadwell sold and conveyed the premises by war-

ranty deed to Lewis J. Haviland, who took possession under his deed and remained in possession until December 17th, 1867, when he sold and conveyed the premises to complainant, who took and holds possession under his deed.

On the third day of November, 1865, some five months after Cadwell had conveyed to Haviland, and while the latter was in possession, the administrator on the estate of Koegel, in pursuance of a license from the probate court, sold the land, or the interest of the deceased therein, to the defendant Wiley, and the report of the sale by the administrator to the probate court (which was confirmed), states, among other things, that there was an adverse claim to the premises sold to said Wiley, and that another party claims to hold the same.

The amount of the improvement upon the land was small, being only about or a trifle over twenty acres, some of which was imperfectly cleared, and the buildings poor and of little value. Whatever of improvement there was upon the land seems to have been mostly made by Koegel, while Cadwell was absent in California and Central America, and if any were made after his return, they were made, so far as the case shows, after Koegel had received notice from Cadwell that he repudiated the deed, or did not intend to be bound by it. And there is no evidence in the case tending to show that Cadwell stood by, after his majority, when improvements were being made upon the land, without objections or notice, or that he was ever aware of any improvements going on upon the land. In our view, therefore, the case is disembarrassed of any question of estoppel upon this ground; and the only question in reference to the validity or effect of the minor's deed, is whether his neglect to make an actual disaffirmance of the deed, by entry or conveyance, until the time he undertook thus to disaffirm it, did, under the circumstances of this case, operate as an affirmance or confirmation of the deed executed during his minority; for, though the question has sometimes been raised whether the conveyance to another person after becoming of age, would, without entry, operate as a disaffirmance, there was here both an actual entry and a conveyance, which clearly operated as a disaffirmance, unless the delay which had previously occurred amounted to an affirmance, and cut off the right to disaffirm.

Upon this question of the affirmance of a deed executed dur-

ing minority, by mere lapse of time, or in other words, by mere silence or acquiescence for any particular period of time, after the minor has attained his majority, it is sufficient, without citing and analyzing authorities, to say that, by the great weight of authority, both English and American, such delay or acquiescence, without any affirmative act indicating an intention to affirm, or tending to mislead the grantee into a belief of such intention, or any circumstances of equitable estoppel, such as standing by and seeing improvements made or money expended, or a sale of the property to another, without asserting his claim (or some such special circumstance), will not operate as an affirmance or confirmation of the deed executed during minority, nor prevent the minor from disaffirming it and reclaiming the land at any time allowed him by the statute of limitation for bringing an action. The question, in such a case, is substantially but a question of the time within which an action may be brought; and the legislature having fixed the time which to them seemed reasonable for this purpose, it is not within the power of the judiciary to change it. But when facts exist which create an equitable estoppel, as above intimated, or some other special circumstances such as are above alluded to, so that the question ceases to be one merely of the length or lapse of time, it may perhaps be very proper to hold, as many cases have held, that the infant should manifest his purpose to disaffirm within a reasonable time; and what should be held to be a reasonable time, might depend much upon the special circumstances of the particular case.

This distinction reconciles nearly, though not quite all of the decisions upon this subject.

In the present case, we can discover no grounds of equitable estoppel and no such special circumstances as can properly be held to change the question from that of simple delay or lapse of time in disaffirming the deed; and we must therefore hold that Cadwell had the right to disaffirm, to re-enter upon the land and to convey to Haviland; and that the complainant therefore obtained and holds the title, and is entitled to the relief he asks to remove the cloud created by the administrator's deed to the defendant.

But the complainant stands only in the place and succeeds only to the rights of Cadwell, who, while a minor, had conveyed

to Wallace; and the defendant occupies the place and is entitled to the equities to which Wallace would have been entitled, had he not conveyed and Cadwell had sought to disaffirm the deed and convey the property. Neither complainant nor defendant has obtained any other rights or equities to which Wallace would have been entitled, had he not conveyed and Cadwell had sought to disaffirm the deed and convey the property. Neither complainant nor defendant has obtained any other rights or equities than would have existed between Cadwell and Wallace. And as the privilege of infancy is a shield for the protection of the infant, and not a weapon of attack, nor to be used as an engine for defrauding others, and he cannot, therefore, especially in a court of equity, be allowed to disaffirm and repudiate his deed and regain the property, without restoring the consideration he had received for it (there being no evidence of bad faith in Wallace in making the purchase). And as the complainant, standing in his place and clothed only with his rights, is compelled to ask the aid of the court of equity to remove the cloud upon his title, he should, I think, as a condition of that relief, consent to do equity to the other party. *Hillyer v. Bennett*, 3 Edw. Ch. 222; *Locke v. Smith*, 41 N. H. 346; *Strain v. Wright*, 7 Geo. 568; *Bailey v. Barnberger*, 11 B. Mon. (Ky.) 113; *Weed v. Beebe*, 21 Vt. 495; 2 Kent's Com. 240.

But upon this point my brethren do not concur in laying down the principle thus broadly, though my Brothers Cooley and Graves concur in the result upon this point in the present case, on the ground that complainant makes no objection to the allowance to defendant of the amount of the consideration, and by implication admits its justice in the present case, while my Brother Campbell thinks the principle inapplicable, even upon this ground, without the clear and express assent of complainant, in a bill like this, to quiet title.

* * * * *

A decree of this court should therefore be entered affirming the decree of the court below in favor of the complainant, on condition that complainant, within sixty days from this date, pay to the defendant the said sum of one hundred and twenty-five dollars, and with interest to the day of such payment; otherwise that complainant's bill be dismissed, with costs to defendant.

The other Justices concurred.

Disaffirmance—Where Infant Has Parted With the Consideration—As to Property Other Than Real Estate—American Rule.

JOHNSON v. NORTHWESTERN MUT. LIFE INS. CO.

56 Minn. 365, 57 N. W. 934, 59 N. W. 992, 26 L. R. A. 187,
45 Am. St. Rep. 473. 1894.

On October 25, 1888, the defendant insured the life of the plaintiff, Martin C. Johnson, then of Stoughton, Wis., in the sum of \$1,000. By its policy it agreed to pay him that sum twenty years thereafter, or in case of his death meantime to pay it to his representatives or assigns sixty days after due proof of his decease. After ten years he was to share in the surplus profits of the company arising from the policy. After three or more annual premiums were paid he was entitled to a paid-up nonparticipating policy for as many twentieth parts of the \$1,000 as he had paid annual premiums. He paid \$23.29 on that date and agreed to pay a like sum every six months thereafter. He was then but seventeen years of age. He paid seven of these semiannual installments, in all \$186.32. On December 19, 1892, immediately after he became of age, he served written notice on the Insurance Company that he elected to avoid the policy and offered to return it, and demanded a return of the money he had paid. It was not repaid, and he soon after brought this action to recover it. His complaint stated these facts, and a copy of the policy was attached. Defendant demurred on the ground that the complaint did not state facts sufficient to constitute a cause of action. The demurrer was overruled, and defendant appeals.

BUCK, J., delivered the opinion of the Court in favor of the respondent, and the order appealed from was affirmed. On re-argument the following opinions were filed:

MITCHELL, J. * * * The former opinion laid down the following propositions, to which we still adhere: (1) That the contract of insurance was of benefit to the infant himself, and was not a contract for the benefit of third parties. (2) The contract, so far as appears on its face, was the usual and

ordinary one for life insurance, on the customary terms, and was a fair and reasonable one, and free from any fraud, unfairness, or undue influence on part of the defendant, unless the contrary is to be presumed from the fact that it was made with the infant.

It is not correct, however, to say that the plaintiff has received no benefit from the contract, or that the defendant has parted with nothing of value under it. True, the plaintiff has received no money, and was insured for four years, and if he had died during that time the defendant would have had to pay the amount of the policy to his estate. The defendant carried the risk all that time, and this is the essence of the contract of insurance. Neither does it follow that the risk has cost the defendant nothing in money because plaintiff himself was not one of those insured who died. The case is therefore one of a voidable or rescindable contract of an infant, partly performed on both sides, the benefits of which the infant has enjoyed, but which he cannot return, and where there is no charge of fraud, unfairness, or undue influence on the part of the other party, unless, as already suggested, it is to be presumed from the fact that the contract was made with an infant. The question is, can the plaintiff recover back what he has paid, assuming that the contract was in all respects fair and reasonable? The opinion heretofore filed held that he can. Without taking time to cite or discuss any of our former decisions, it is sufficient to say that none of them commit this court to such a doctrine. That such a rule goes further than is necessary for the protection of the infant, and would often work gross injustice to those dealing with him, is, to our minds, clear. Suppose a minor engaged in agriculture should hire a man to work on his farm, and pay him reasonable wages for his services. According to this rule the minor might recover back what he paid, although retaining and enjoying the fruits of the other man's labor. Or, again, suppose a man engaged in mercantile business, with a capital of \$5,000, should, from time to time, buy and pay for \$10,000 worth of goods, in the aggregate, which he had sold, and had got his pay. According to this doctrine, he could recover back the \$10,000 which he had paid to the various parties from whom he had bought the goods. Not only would such a rule work great injustice to others, but it would be positively injurious to

the infant himself. The policy of the law is to shield or protect the infant, and not to debar him from the privilege of contracting.

But, if the rule suggested is to obtain, there is no footing on which an adult can deal with him, except for necessities. Nobody could or would do any business with him. He could not get his life insured. He could not insure his property against fire. He could not hire servants to till his farm. He could not improve or keep up his land or buildings. In short, however advantageous other contracts might be to him, or however much capital he might have, he could do absolutely nothing, except to buy necessities, because nobody would dare to contract with him for anything else. It cannot be that this is the law. Certainly, it ought not to be.

The following propositions are well settled everywhere, as to the rescindable contracts of an infant, and in that category we include all contracts except for necessities:

First. That, in so far as a contract is executory on part of an infant, he may always interpose his infancy as a defense to an action for its enforcement. He can always use his infancy as a shield.

Second. If the contract has been wholly or partly performed on his part, but is wholly executory on the part of the other party, the minor having received no benefits from it, he may recover back what he has paid or parted with.

Third. Where the contract has been wholly or partly performed on both sides, the infant may always rescind, and recover back what he has paid, upon restoring what he has received.

Fourth. A minor, on arriving at full age, may avoid a conveyance of his real estate without being required to place the grantee in *statu quo*, although a different rule has sometimes been adopted by courts of equity when the former infant has applied to them for aid in avoiding his deeds. Whether this distinction between conveyances of real property and personal contracts is founded on a technical rule, or upon considerations of policy growing out of the difference between real and personal property, it is not necessary here to consider.

Fifth. Where the contract has been wholly or partly performed on both sides, the infant, if he sues to recover back what

he has paid, must always restore what he has received, in so far as he still retains it in specie.

Sixth. The courts will always grant an infant relief whether the other party has been guilty of fraud or undue influence. As to what would constitute a sufficient ground for relief under this head, and what relief the courts would grant in such cases, we will refer to hereafter.

But suppose that the contract is free from all elements of fraud, unfairness, or overreaching, and the infant has enjoyed the benefits of it, but has spent or disposed of what he has received, or the benefits received are, as in this case, of such a nature that they cannot be restored. Can he recover back what he has paid? It is well settled in England that he cannot. This was held in the leading case of *Holmes v. Blogg*, 8 Taunt. 508, approved as late as 1890 in *Valentini v. Canali*, 24 Q. B. Div. 166. Some obiter remarks of the chief justice in *Holmes v. Blogg*, to the effect that an infant could never recover back money voluntarily paid, were too broad, and have often been disapproved,—a fact which has sometimes led to the erroneous impression that the case itself has been overruled. *Corpe v. Overton*, 10 Bing. 252 (decided by the same court), held that the infant might recover back what he had voluntarily paid, but on the ground that the contract in that case remained wholly executory on part of the other party, and hence the infant had never enjoyed its benefits.

In *Chitty on Contracts* (volume 1, p. 222), the law is stated in accordance with the decision in *Holmes v. Blogg*. Leake,—a most accurate writer,—in his work on *Contracts* (page 553), sums up the law to the same effect. In this country, Chancellor Kent (2 Kent, Comm. 240), and Reeves in his work on *Domestic Relations* (chapters 2 and 3, tit. "Parent and Child"), state the law in exact accordance with what we may term the "English rule." Parsons, in his work on *Contracts* (volume 1, p. 322), undoubtedly states the law too broadly, in omitting the qualification, "and enjoys the benefit of it."

At least a respectable minority of the American decisions are in full accord with what we have termed the "English rule." See, among others, *Riley v. Mallory*, 33 Conn. 206; *Adams v. Beall*, 67 Md. 53, 8 Atl. 664, 1 Am. St. Rep. 379; *Breed v. Judd*, 1 Gray (Mass.) 455. But many—perhaps a

majority—of the American decisions, apparently thinking that the English rule does not sufficiently protect the infant, have modified it; and some of them seem to have wholly repudiated it, and to hold that although the contract was in all respects fair and reasonable, and the infant had enjoyed the benefits of it, yet if the infant had spent or parted with what he had received, or if the benefits of it were of such a nature that they could not be restored, still he might recover back what he had paid. The problem with the courts seems to have been, on the one hand, to protect the infant from the improvidence incident to his youth and inexperience, and how, on the other hand, to compel him to conform to the principles of common honesty. The result is that the American authorities—at least the later ones—have fallen into such a condition of conflict and confusion that it is difficult to draw from them any definite or uniform rule.

The dissatisfaction with what we have termed the “English rule” seems to be generally based upon the idea that the courts would not grant an infant relief, on the ground of fraud or undue influence, except where they would grant it to an adult on the same grounds, and then only on the same conditions. Many of the cases, we admit, would seem to support this idea. If such were the law, it is obvious that there would be many cases where it would furnish no adequate protection to the infant. Cases may be readily imagined where an infant may have paid for an article several times more than it was worth, or where the contract was of an improvident character, calculated to result in the squandering of his estate, and that fact was known to the other party; and yet if he was an adult the court would grant him no relief, but leave him to stand the consequences of his own foolish bargain. But to measure the right of an infant in such cases by the same rule that would be applied in the case of an adult would be to fail to give due weight to the disparity between the adult and the infant, or to apply the proper standard of fair dealing due from the former to the latter. Even as between adults, when a transaction is assailed on the ground of fraud, undue influence, etc., their disparity in intelligence and experience, or in any other respect which gives one an ascendancy over the other, or tends to prevent the latter from exercising an intelligent and unbiased

judgment, is always a most vital consideration with the courts. Where a contract is improvident and unfair, courts of equity have frequently inferred fraud from the mere disparity of the parties.

If this is true as to adults, the rule ought certainly to be applied with still greater liberality in favor of infants, whom the law deems so incompetent to care for themselves that it holds them incapable of binding themselves by contract, except for necessities. In view of this disparity of the parties, thus recognized by law, every one who assumes to contract with an infant should be held to the utmost good faith and fair dealing. We further think that this disparity is such as to raise a presumption against the fairness of the contract, and to cast upon the other party the burden of proving that it was a fair and reasonable one, and free from any fraud, undue influence, or overreaching.

A similar principle applies to all the relations, where, from disparity of years, intellect, or knowledge, one of the parties to the contract has an ascendancy which prevents the other from exercising an unbiased judgment,—as, for example, parent and child, husband and wife, guardian and ward. It is true that the mere fact that a person is dealing with an infant creates no “fiduciary relation” between them, in the proper sense of the term, such as exists between guardian and ward; but we think that he who deals with an infant should be held to substantially the same standard of fair dealing, and be charged with the burden of proving that the contract was in all respects fair and reasonable, and not tainted with any fraud, undue influence, or overreaching on his part. Of course, in this as in all other cases, the degree of disparity between the parties, in age and mental capacity, would be an important consideration. Moreover, if the contract was not in all respects fair and reasonable, the extent to which the infant should recover would depend on the nature and extent of the element of unfairness which characterized the transaction.

If the party dealing with the infant was guilty of actual fraud or bad faith, we think the infant should be allowed to recover back all he had paid, without making restitution, except, of course, to the extent to which he still retained in specie what he had received. Such a case would be a contract essentially

improvident, calculated to facilitate the squandering the infant's estate, and which the other party knew or ought to have known to be such, for to make such a contract at all with an infant would be fraud. But if the contract was free from any fraud or bad faith, and otherwise reasonable, except that the price paid by the infant was in excess of the value of what he received, his recovery should be limited to the difference between what he paid and what he received. Such cases as *Medbury v. Watrous*, 7 Hill (N. Y.) 110; *Sparman v. Keim*, 83 N. Y. 245; and *Heath v. Stevens*, 48 N. H. 251,—really proceed upon this principle, although they may not distinctly announce it. The objections to this rule are, in our opinion, largely imaginary, for we are confident that in practice it can and will be applied by courts and juries so as to work out substantial justice.

Our conclusion is that where the personal contract of an infant, beneficial to himself, has been wholly or partly executed on both sides, but the infant has disposed of what he has received, or the benefits recovered by him are such that they cannot be restored, he cannot recover back what he has paid, if the contract was a fair and reasonable one, and free from any fraud or bad faith on part of the other party, but that the burden is on the other party to prove that such was the character of the contract; that, if the contract involved the element of actual fraud or bad faith, the infant may recover all he paid or parted with, but if the contract involved no such elements, and was otherwise reasonable and fair, except that what the infant paid was in excess of the value of what he received, his recovery should be limited to such excess. It seems to us that this will sufficiently protect the infant, and at the same time do justice to the other party. Of course, in speaking of contracts beneficial to the infant, we refer to those that are deemed such in contemplation of law.

Applying these rules to the case in hand, we add that life insurance in a solvent company, at the ordinary and usual rates, for an amount reasonably commensurate with the infant's estate, or his financial ability to carry it, is a provident, fair, and reasonable contract, and one which it is entirely proper for an insurance company to make with him, assuming that it practices no fraud or other unlawful means to secure it; and if such should appear to be the character of this contract the plaintiff

could not recover the premiums which he has paid in, so far as they were intended to cover the current annual risk assumed by the company under its policy.

But it appears from the face of the policy that these premiums covered something more than this. The policy provides that after payment of three or more annual premiums the insured will be entitled to a paid-up, nonparticipating policy for as many twentieths of the original sum insured (\$1,000) as there have been annual premiums so paid. The complaint alleges the payment of four annual premiums. Hence, the plaintiff was entitled, upon surrender of the original policy, to a paid-up, nonparticipating policy for \$200; and it therefore seems to us that, having elected to rescind, he was entitled to recover back, in any event, the present cash "surrender" value of such a policy. For this reason, as well as that the burden was on the defendant to prove the fair and honest character of the contract, the demurrer to the complaint was properly overruled. The result arrived at in the former opinion was therefore correct, and is adhered to, although on somewhat different grounds. Order affirmed.

GILFILLAN, C. J. I dissent, and especially from the proposition that in any case the contract of a minor is presumed to be fraudulent on the part of the other party to it. If two minors contract together, each may avoid the contract. Is that because each is presumed to have fraudulently drawn the other into making it? If a contract be wholly executory when the minor seeks to avoid it, will any amount of proof that it is advantageous to him, and made in good faith and honest on the part of the adult, prevent the minor avoiding it? If wholly executory when made, will the subsequent performance raise a presumption that it was fraudulent when made?

A minor's contract, except for necessities, is voidable by him only because he is, in law, incapable to bind himself. When he seeks to avoid a contract the question arises, on what conditions shall he do so? In such cases there are two considerations—First, to afford him full protection from the consequences of his own incapacity; second, that being done, to prevent him making his legal incapacity a means to defraud others.

If the contract be wholly executory, both ends will be attained

by allowing him to repudiate it, which will leave both parties as they were before it was made. But suppose it is partly performed on both sides? He may undoubtedly avoid further performance. But if he takes the aggressive, and seeks to recover what he has parted with in performance, what then? The authorities are agreed that, if he have in specie what he received under it, he must restore it, as a condition of recovering what he parted with. The disagreement in the authorities is in cases where he cannot restore the benefits he has received; where he has expended them, or they are of such a character that they cannot be restored. I am speaking only of contracts relating to the personalty.

Since the first argument of this cause, I have come to the conclusion that whether, when he cannot restore what he has received, he may recover what he has parted with, will depend on the character of the contract. If from the subject-matter or terms of the contract, it is a wasting of his estate, so that to require him to restore what he has received will likewise waste his estate, it will not be required of him. But if the contract be, both in subject-matter and terms, a provident one,—advantageous to the minor,—the court, to prevent a fraud on the other party, unnecessary to his protection, will not permit him to recover what he has parted with without setting off against it what he has received. Such is this case.

EUREKA CO. v. EDWARDS.

71 Ala. 248, 46 Am. Rep. 314. 1881.

Bill in equity by Eureka Company to set aside a deed of June 12th, 1869, executed by Joseph C. Burgin and Ann Judson, both minors, to Giles Edwards. The facts alleged and proved were that the consideration paid for the conveyance was \$1,100, of which Joseph C. and Ann Judson received \$200, and each had used and expended this money before they reached twenty-one. Upon attaining their majority the said Joseph C. and Ann disaffirmed their deed to Edwards and conveyed to others, from whom the title came to the complainant, the Eureka Company.

On the hearing had on pleadings and proof the Chancellor

entered a decree denying relief to the complainant and granting an injunction prayed by Giles Edwards in his cross bill, that the complainant be perpetually enjoined from setting up any claim to the premises in question. This decree is assigned as error.

STONE, J. (The Court, after summing up the facts, proceeded thus:) It is thus shown that the appellant—complainant below—stands in the shoes, and can assert only the rights which Joseph C. Burgin and Ann Judson Thrasher could originally assert. Appellee contends that if the complainant has made a good case on all the points noted above, the contract of sale to Edwards and associates can be disaffirmed and set aside, only on condition that the money paid by them for the mineral rights is either paid or tendered to them; and that inasmuch as the present bill seeks affirmative relief against their prior purchase, the bill should tender to them the eleven hundred dollars they paid, and interest upon it. The defense further claims that if mistaken in the amount the complainant should have offered to pay, the bill should at least have offered to refund the two hundred dollars received by Joseph C. and Ann Judson, and interest upon it.

A distinction is taken in the books between executory and executed contracts made by infants. In the former class of cases, if the infant on becoming of age disaffirms the contract, then the adult purchaser or contractor will be forced to become the actor, to have the contract performed. In such cases the infant, or quondam infant, is under no conditions or limitations in asserting the invalidity of the contract. Being voidable, and he making timely election to avoid by pleading his minority, his defense, if sustained by proof, will prevail. He need not tender back any thing he may have acquired or received under the contract. The most that can be required of him is, that if he retained and held all or any part of what he had received under the contract until he reached the age of twenty-one, then, on demand or suit, he can be held to account for it. The rule is different when the contract has been executed. Then the quondam infant, or any one asserting claim in his right, must become the actor; and coming into court in quest of equity, he must do, or offer to do equity, as a condition on which relief will be

decreed to him. This is the difference between asking and resisting relief. *Roof v. Stafford*, 7 Cow. 179 (N. Y.); *Hillyer v. Bennett*, 3 Edw. Ch. 222 (N. Y.); *Bartholomew v. Finne-
more*, 17 Barb. 428 (N. Y.); *Smith v. Evans*, 5 Humph. 70 (Tenn.); *Mustard v. Wohlford*, 15 Grat. 329 (Va.), 76 Am. Dec. 209; *Bedinger v. Wharton*, 27 Grat. 857 (Va.). But it is only in equity this principle obtains. If the suit be at law, the tender need not ordinarily be made as a condition of recovering the property, but if the suit be in equity, and if the money or other valuable thing be still in *esse*, and in possession of the party seeking the relief, or in him from whom the right to sue is derived, the bill, to be sufficient, must tender, or offer to produce or pay, as the case may be. Not so, if the infant has used or consumed it during his minority. * * *

The bill in the present case avers, and the proof sustains it, that the money received by Joseph C. and Ann Judson in the sale to Edwards, had been consumed and disposed of by them while they were minors. This relieved complainant of the duty of tendering, or offering to pay. If it did not, then the offer in the present bill would be insufficient. The offer is "to do equity, and to abide by and perform such things as, under equity and good conscience, may seem meet to entitle it to a decree for the cancellation of said deed." The offer should have been to refund the money, with interest. There was, however, no demurrer to the bill. Under no circumstances, would it be necessary for Joseph C. and Ann Judson to repay the money which had been paid to the other Burgins.

There is nothing in the argument that McDougal, Salmons and the Eureka Company had notice of the prior conveyance to Edwards. That conveyance conferred a legal title, or it conferred nothing. It is only when there is a prior right, legal or equitable, that notice actual or constructive, becomes material, to intercept or dominate an after acquired title. The disaffirmance of the sale made by the infants to Edwards, destroyed all his claim, both legal and equitable, which their deed had vested in him, and left in him no pretense of any equity, to assert against a later purchaser with notice.

The decree of the chancellor is reversed, and the cause remanded, that the complainant may have the relief prayed by its bill. It should be borne in mind that the deed to Edwards

and associates can be cancelled only as to Joseph C. and Ann Judson. The grantees are entitled to the custody and ownership of their deed, as against the other grantors. The deed should not, on its face, be marred or mutilated.

Division III.—Miscellaneous.

COURSOLLE v. WEYERHAUSER.

69 Minn. 328, 332. 1897.

MITCHELL, J. * * * The rule is that the act to be ratified must be voidable merely, and not absolutely void; and the question remains—which to our minds is the most important one in the case—whether the act of a minor in appointing an agent or attorney is wholly void, or merely voidable. Formerly the acts and contracts of infants were held either void, or merely voidable, depending on whether they were necessarily prejudicial to their interests, or were or might be beneficial to them. This threw upon the courts the burden of deciding in each particular case whether the act in question was necessarily prejudicial to the infant. Latterly the courts have refused to take this responsibility, on the ground that, if the infant wishes to determine the question for himself on arriving at his majority, he should be allowed to do so, and that he is sufficiently protected by his right of avoidance. Hence the almost universal modern doctrine is that all the acts and contracts of an infant are merely voidable. Upon this rule there seems to have been ingrafted the exception that the act of an infant in appointing an agent or attorney, and consequently all acts and contracts of the agent or attorney under such appointment, are absolutely void. This exception does not seem to be founded on any sound principle, and all the text-writers and courts who have discussed the subject have, so far as we can discover, conceded such to be the fact. On principle, we think the power of attorney of an infant, and the acts and contracts made under it, should stand on the same footing as any other act or contract, and should be considered voidable in the same manner as his personal acts and contracts are considered voidable. If the conveyance of land by an infant personally, who is of imperfect

capacity, is only voidable, as is the law, it is difficult to see why his conveyance made through an attorney of perfect capacity should be held absolutely void. It is a noticeable fact that nearly all the old cases cited in support of this exception to the general rule are cases of technical warrants of attorney to appear in court and confess judgment. In these cases the courts hold that they would always set aside the judgment at the instance of the infant, but we do not find that any of them go as far as to hold that the judgment is good for no purpose and at no time. The courts have from time to time made so many exceptions to the exception itself that there seems to be very little left of it, unless it be in cases of powers of attorney required to be under seal, and warrants of attorney to appear and confess judgment in court. * * * Hence, notwithstanding numerous general statements in the books to the contrary, we feel at liberty to hold, in accordance with what we deem sound principle, that the power of attorney from plaintiff to Dorr, and the deed to Brown under that power, were not absolutely void because of plaintiff's infancy, but merely voidable, and that they were ratified by him after attaining his majority.

HUSBAND AND WIFE

CHAPTER VII.

INCEPTION AND NATURE OF MARRIAGE RELATION.

Civil or Social Position as a Disqualification.

STATE, APPELLANT, v. JACKSON.

80 Mo. 175. 1883.

Appeal from Cape Girardeau Circuit Court. Reversed.

HENRY, J. At the May term, 1880, of the circuit court of Cape Girardeau county, the defendant, a white woman, was indicted for having intermarried with Dennis Jackson, a person having more than one-eighth part of negro blood. A demurrer was sustained on the ground that the law on which the indictment was based, section 1540, Revised Statutes, 1879, is in conflict with the 14th amendment of the Constitution of the United States, as also with the 17th subdivision of section 53 of article 4 of the constitution of this State.

Section 1540, Revised Statutes 1879, is as follows: "No person having one-eighth part or more of negro blood shall be permitted to marry any white person, nor shall any white person be permitted to marry any negro or person having one-eighth part or more of negro blood; and every person who shall knowingly marry in violation of the provisions of this section, shall, upon conviction, be punished by imprisonment in the penitentiary for two years, or by fine not less than \$100, or by imprisonment in the county jail not less than three months, or by both such fine and imprisonment; and the jury trying any such case may determine the proportion of negro blood in any party to such marriage from the appearance of such person."

We are unable to perceive any conflict between that section and the clause of our State constitution which declares that: "The general assembly shall not pass any local or special law regulating the practice or jurisdiction of or changing the rules of evidence in any judicial proceeding or inquiry before courts. * * *" It did not change the practice or jurisdiction or rules of evidence in any judicial proceeding or inquiry before any judicial tribunal. Besides, it is not a special or local but a general law, embracing all citizens of this State, white as well as black.

It may interfere with the taste of negroes who want to marry whites, or whites who wish to intermarry with negroes, but the State has the same right to regulate marriages in this respect that it has to forbid the intermarriage of cousins and other blood relations. If the State desires to preserve the purity of the African blood by prohibiting marriages between whites and blacks, we know of no power on earth to prevent such legislation. It is a matter of purely domestic concern. The 14th amendment to the Constitution of the United States, to which by some, magical power is ascribed, has no such scope as seems to have been accorded to it by the circuit court. It declares that: "All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States, and of the state wherein they reside," and that "No state shall make or enforce any law which shall abridge the privilege or immunities of citizens of the United States."

Every Chinaman, Indian and Hottentot born in the United States and subject to its jurisdiction is, under the definition of a citizen, contained in the 1st section of the amendment, a citizen of the United States; and under the general sweeping declarations of the latter clause of that section it is necessary to determine what are the privileges and immunities of citizens of the United States. They are those secured to them by the Constitution of the United States and laws enacted in pursuance thereof. All of one's rights as a citizen of the United States will be found guaranteed by the Constitution of the United States. If any provision of that instrument confers upon a citizen the right to marry any one who is willing to wed him, our attention has not been called to it. If such be one of the rights attached to American citizenship all our marriage acts

forbidding intermarriages between persons within certain degrees of consanguinity are void, and the nephew may marry his aunt, the niece her uncle, and the son his mother or grandmother.

The act in question is not open to the objection that it discriminates against the colored race, because it equally forbids white persons from intermarrying with negroes, and prescribes the same punishment for violation of its provisions by white as by colored persons, and an act of congress interfering with such legislation and declaring that it should be lawful in Missouri for a black man and a white woman, or a white man and a black woman, to intermarry would be without any binding force, because wholly unauthorized by any provision of the Constitution of the United States. In the *Slaughter House Cases*, 16 Wall. 36, the Supreme Court of the United States said with reference to the 5th section of the 14th amendment: "We doubt very much whether any action of a state, not directed by way of discrimination against the negroes as a class, will ever be held to come within the purview of this provision." In *Minor v. Happersett*, 21 Wall. 162, that court held that "the 14th amendment of the Constitution of the United States does not add to the privileges or immunities of citizens but only furnishes additional protection for the privileges already existing, and neither in the letter nor spirit of the constitution can a citizen find his right to intermarry with anyone whom he may select who is willing to accept him. The power of each state to regulate and control marriages within its jurisdiction, is as unquestionable as state sovereignty, and, as was observed by Buskirk, J., in the *State v. Gibson*, 36 Ind. 389 s. c.; 10 Am. Rep. 42; "If the federal government can determine who can marry in a state, there is no limit to its power. It can legislate upon all subjects growing out of this relation. It can determine the rights, duties and obligations of husband and wife, parent and child, guardian and ward. It may pass laws regulating the granting of divorce. It may assume, exercise and absorb all the powers of a local and domestic character. This would result in the destruction of the states." 1 *Bishop on Marriage and Divorce* (4th ed.) 87; *State v. Kennedy*, 76 N. C. 251; s. c., 22 Am. Rep. 683.

It was held in *Burns v. State*, 48 Ala. 195; s. c., 17 Am. Rep. 34, that a statute of that state imposing a fine upon a justice of

the peace for solemnizing the rites of matrimony between a white person and a negro, was abrogated by the 14th amendment of the Constitution of the United States, and that decision is in conflict not only with the weight of authority on the subject elsewhere, but with a decision of the same court, reported in 42 Ala. 525, *Ellis v. State*.

If that amendment does not add to the privileges or immunities of citizens, in what other section of the constitution will the right of a white man to marry a negro woman, or a negro man to marry a white woman be found? Marriage acts similar to the one under consideration were in force in most of the slave-holding states prior to the adoption of the 14th amendment, and their validity was never questioned (*United States v. Stanley*, 109 U. S. 3; s. c., 22 Am. Law Reg. 790); no one supposing that there was, prior to that amendment, any provision of the federal constitution with which they were in conflict, and it is only by ascribing to that amendment a force and scope expressly denied it by the Supreme Court of the United States that any ground exists for questioning their validity now. Nor is it one of the natural rights of man to marry whom he may choose.

Under the Jewish dispensation persons nearly related by ties of blood intermarried, but in no Christian land are such marriages tolerated. The right to regulate marriage, the age at which persons may enter into that relation, the manner in which the rights may be celebrated and the persons between whom it may be contracted, has been assumed and exercised by every civilized and Christian nation; and the condition of a community, moral, mental and physical, which would tolerate indiscriminate intermarriage for several generations, would demonstrate the wisdom of laws which regulate marriage and forbid the intermarriage of those nearly related in blood. It is stated as a well authenticated fact that if the issue of a black man and a white woman, and a white man and a black woman, intermarry, they cannot possibly have any progeny, and such a fact sufficiently justifies those laws which forbid the intermarriage of blacks and whites, laying out of view other sufficient grounds for such enactments.

The judgment of the circuit court is reversed and the cause remanded. All concur.

PACE v. ALABAMA.

106 U. S. 583. 1882.

Error to the Supreme Court of the State of Alabama.

§ 4184 of the Code of Alabama provides that "if any man and woman live together in adultery or fornication, each of them must, on the first conviction of the offence, be fined not less than one hundred dollars, and may also be imprisoned in the county jail or sentenced to hard labor for the county for not more than six months. On the second conviction for the offence with the same person, the offender must be fined not less than three hundred dollars, and may be imprisoned in the county jail, or sentenced to hard labor for the county for not more than twelve months; and for a third or any subsequent conviction with the same person, must be imprisoned in the penitentiary, or sentenced to hard labor for the county for two years."

§ 4189 of the same code declares that "if any white person and any negro, or the descendant of any negro to the third generation, inclusive, though one ancestor of each generation was a white person, intermarry or live in adultery or fornication with each other, each of them must, on conviction, be imprisoned in the penitentiary or sentenced to hard labor for the county for not less than two nor more than seven years."

In November, 1881, Tony Pace, a negro man, and Mary J. Cox, a white woman, were indicted, under section 4189, in a Circuit Court of Alabama, for living together in a state of adultery or fornication and were tried, convicted, and sentenced, each to two years' imprisonment in the State penitentiary. On appeal to the Supreme Court of the State the judgment was affirmed, and he brought the case here on a writ of error, insisting that the act under which he was indicted and convicted is in conflict with the concluding clause of the first section of the Fourteenth Amendment of the Constitution, which declares that no State shall "deny to any person the equal protection of the laws."

FIELD, J., delivered the opinion of the court, and after stating the case as above, proceeded as follows:

The counsel of the plaintiff in error compares §§ 4184 and 4189 of the Code of Alabama, and assuming that the latter

relates to the same offence as the former, and prescribes a greater punishment for it, because one of the parties is a negro or of negro descent, claims that a discrimination is made against colored persons in the punishment designated, which conflicts with the clause of the Fourteenth Amendment prohibiting a State from denying to any person within its jurisdiction the equal protection of the laws.

The counsel is undoubtedly correct in his view of the purpose of the clause of the amendment in question, that it was to prevent hostile and discriminating State legislation against any person or class of persons. Equality of protection under the laws implies not only accessibility by each one, whatever his race, on the same terms with others to the courts of the country for the security of his person and property, but that in the administration of criminal justice he shall not be subjected for the same offence to any greater or different punishment. Such was the view of Congress in the enactment of the Civil Rights Act of May 31, 1870, c. 114, after the adoption of this amendment. That act, after providing that all persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence and to the full and equal benefit of all laws and proceedings for the security of person and property as is enjoyed by white citizens, declares in § 16, that they "shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind and none other, any law, statute, ordinance, regulation, or custom to the contrary notwithstanding."

The defect in the argument of counsel consists in his assumption that any discrimination is made by the laws of Alabama in the punishment provided for the offence for which the plaintiff in error was indicted when committed by a person of the African race, and when committed by a white person. The two sections of the code cited are entirely consistent. The one prescribes, generally, a punishment for an offence committed between persons of different sexes; the other prescribes a punishment for an offence which can only be committed where the two sexes are of different races. There is in neither section any discrimination against either race. § 4184 equally includes the offence when the persons of the two sexes are both white and when they are both black. § 4189 applies the same punishment to both of-

fenders, the white and the black. Indeed, the offence against which this latter section is aimed cannot be committed without involving the persons of both races in the same punishment. Whatever discrimination is made in the punishment prescribed in the two sections is directed against the offence designated and not against the person of any particular color or race. The punishment of each offending person, whether white or black, is the same.

Judgment affirmed.

STATE v. GIBSON.

36 Ind. 389. 1871.

Appeal from the Vanderburg Criminal Court.

BUSKIRK, J. It appears of record in this cause, that appellee was charged by indictment in the court below with having unlawfully and knowingly married, in the county and State aforesaid, one Jennie Williams, a white woman of this State, he then and there having one-eighth part or more of negro blood.

The indictment was, upon the motion of the appellee, quashed, and the State, by her prosecuting attorney, excepted and prosecutes this appeal to obtain a reversal of the judgment.

The indictment was based upon the forty-seventh section of the act defining felonies, which reads as follows:

“§ 47. No person having one-eighth part or more of negro blood, shall be permitted to marry any white woman of this State, nor shall any white man be permitted to marry any negro woman, or any woman having one-eighth part or more of negro blood, and every person who shall knowingly marry in violation of the provisions of this section, shall, upon conviction thereof, be imprisoned in the State's prison, not less than one, nor more than ten years, and be fined not less than one thousand nor more than five thousand dollars.” 2 G. & H. 452.

The sole question which is presented for our consideration and decision is as to the correctness of the ruling of the court in quashing the indictment. It seems to be conceded by the appellee, that the indictment, under our code of criminal procedure, is good, in substance and matter of form, if the section of our

statute above quoted is still in force; but, it is earnestly maintained that all the laws of our State prohibiting the intermarriage of negroes and white persons were abrogated by the ratification of the fourteenth amendment of the constitution of the United States, and the passage of the civil rights bill. The position assumed by the attorney of the appellee is stated in these words:

“The appellee contends that all the laws of this State prohibiting the marrying of blacks and whites are abrogated by the fourteenth amendment to the constitution of the United States, and the law of Congress passed in pursuance to that amendment, which in express terms confers upon colored people the power of making contracts.

“Marriage by the laws of Indiana, being only a civil contract, 1 G. & H. 428, § 1, it follows that the marriage specified in this indictment was lawful; and hence the judgment of the court is correct.”

The only question presented for the decision of this court is whether the position assumed by the appellee is correct. The magnitude and importance of the question involved cannot be over-estimated, and we have given it our best and most thoughtful consideration. We approach its investigation, profoundly impressed with the weight of responsibility that our oath to support the Constitution of the United States and of the State of Indiana has imposed upon us.

The first section of the fourteenth amendment is in these words:

“§ 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law.”

This amendment was proposed by Congress, June 16th, 1866, and declared by the Secretary of State to have been ratified July 28th, 1868.

This amendment contains four separate and distinct propositions; first, it confers the right of citizenship upon all persons

born or naturalized in the United States, and who are subject to the jurisdiction thereof; second, it declares that no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; third, it prohibits any State from depriving any citizen of life, liberty, or property, without due process of law; fourth, it provides that no State shall deny to any person within its jurisdiction the equal protection of the law.

It is settled by very high authority, that, in placing a construction upon a constitution or any clause or part thereof, a court should look to the history of the times, and examine the state of things existing when the constitution or any part thereof was framed and adopted, to ascertain the old law, the mischief and the remedy. The court should also look to the nature and objects of the particular powers, duties, and rights in question, with all the light and aids of contemporary history, and give to the words of each provision just such operation and force, consistent with their legitimate meaning, as will fairly secure the end proposed. *Kendall v. The U. S.*, 12 Pet. 524; *Prigg v. The Commonwealth*, 16 Pet. 539.

Guided by these wise and well settled rules of interpretation, we proceed to place a construction upon the section under examination. The persons referred to in the section under examination are described as "all persons born or naturalized in the United States." The race or class of persons intended to be benefited are not described. It is quite manifest that it did not refer to persons of the white race, for when persons of that race are born in the United States, they are by birthright citizens, and when they are born elsewhere, and have been naturalized under the law of Congress, they become citizens of the United States and of the State where they reside. We know from the history of the times that the main purpose of this amendment was to confer the right of citizenship upon persons of the African race who had previously not been citizens. When these persons became citizens, they were entitled to the privileges and immunities secured to all citizens by section two, of article four, which declares that "the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States." But the framers and advocates of this amendment seemed to be unwilling to rely upon the above section, and therefore added

the other clauses which were intended to secure to the newly made citizens the full and equal protection of the law.

* * * * *

The fourteenth amendment contains no new grant of power from the people, who are the inherent possessors of all power, to the federal government. It did not enlarge the powers of the federal government, nor diminish those of the States. The inhibitions against the States doing certain things have no force or effect. They do not prohibit the States from doing any act that they could have done without them. The constitution was made for the protection of all citizens. It is adapted to our condition in every State of our natural advancement. When new territory is acquired or new citizens created, the constitution extends itself over and protects the territory and citizens in the same manner that it extended over and protected the original thirteen States and the men who achieved our independence, and made the constitution, and formed the union of the States. From the Atlantic to the Pacific, and from the lakes to the borders of Mexico, it has stretched forth its cherishing arm over our people, and diffused its blessings on all alike. The only effect of the amendment under consideration was to extend the protection and blessings of the constitution and laws to a new class of persons. When they were made citizens they were as much entitled to the protection of the constitution and the laws as were the white citizens, and the States could no more deprive them of privileges and immunities than they could citizens of the white race. Citizenship entitled them to protection of life, liberty and property, and the full and equal protection of the laws. Nor has the ratification of this amendment in any manner or to any extent impaired, weakened or taken away any of the reserved rights of the States, as they had existed and been fully recognized by every department of the national government from its creation. This amendment conferred citizenship upon persons of the African race, but we will hereafter inquire and decide whether citizenship conferred on them the right to intermarry with persons of the white race.

But it is urged that the civil rights bill has abrogated the section of our statute which renders it a felony for a negro to marry a white woman in this State, or for a white man to marry a negro woman. It is claimed that the first section of the said

act, which confers upon persons of the African race the right to make and enforce contracts, has made it lawful for negroes, in all of the States, to make and enter into contracts of marriage with persons of a white race. The argument is, that under our laws marriage is a civil contract, and as negroes are authorized to make contracts, that, therefore, they can make any kind of contracts, notwithstanding the contract may be in violation of the laws of an independent and sovereign State. Waiving for the present the power of Congress to pass a law authorizing any class of persons to make and enforce contracts in a State, we proceed to examine the first section of the civil rights bill, and to determine whether the position assumed by the appellee is sustained thereby. In our opinion it is wholly untenable and that this is demonstrated by the plain, express and undoubted language of the said section.

The first section of the said act is in these words:

“That all persons born in the United States, and not subject to any foreign power, excluding Indians, not taxed, are hereby declared to be citizens of the United States; and that such citizens of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall have the same right in every state and territory in the United States to make and enforce contracts, to sue, be parties and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to have the full and equal benefit of all laws and proceedings for the security of person and property as is enjoyed by white persons, and shall be subject to like punishment, pains and penalties, and to none other, any law, statute, ordinance, regulation or custom to the contrary notwithstanding.”

This act took effect on the 9th day of April, 1866, which was prior to the ratification of the fourteenth amendment. This amendment seems to have been mainly copied from, or modelled after the section above quoted from the civil rights bill. This section confers upon persons of the African race the power to make and enforce contracts. The power as conferred in the first part of the section is without limitations, but in the subsequent part of the section, it is restricted and qualified by the plain and express declaration, that the rights conferred shall be enjoyed

and exercised, in the same manner and to the same extent, "as is enjoyed by white persons." The only force and effect of this section was to confer upon persons of the African race the same civil rights, privileges, and immunities, as had been enjoyed by persons of the white race.

[The Court then considered the power of Congress under the federal Constitution, to pass a law regulating the institution of marriage in the States.]

* * * * *

There can be no doubt that Congress possesses the power to determine who may, or may not, make contracts, and prescribe the manner of their enforcement, in the District of Columbia, and in all other places where the federal government has exclusive jurisdiction; but we deny the power and authority of Congress to determine who shall make contracts or the manner of enforcing them in the several States. Nor is there any doubt that Congress may provide for the punishment of those who violate the laws of Congress; but we utterly deny the power of Congress to regulate, control, or in any manner to interfere with the States in determining what shall constitute crimes against the laws of the State, or the manner or extent of the punishment of persons charged and convicted with the violation of the criminal laws of a sovereign State. In this State marriage is treated as a civil contract, but it is more than a mere civil contract. It is a public institution established by God himself, is recognized in all Christian and civilized nations, and is essential to the peace, happiness and well-being of society. In fact, society could not exist without the institution of marriage, for upon it all the social and domestic relations are based. The right, in all States, to regulate and control, to guard, protect and preserve this God-given, civilizing, and Christianizing institution is of inestimable importance, and cannot be surrendered, nor can the States suffer or permit any interference therewith. If the federal government can determine who may marry in a State, there is no limit to its power. It can legislate upon all subjects connected with, or growing out of this relation. It can determine the right, duties, and obligations of husband and wife, parent and child, guardian and ward. It may pass laws regulating the granting of divorces. It may assume, exercise, and absorb all the powers of a local and domestic character. This would result in the destruction of the

States. The federal government cannot exist without the States, but the States could exist without the federal government, as they did before its creation. There is no necessity for the destruction of either. The authority of the federal government begins where the authority of the State ceases. The State government controls all matters of a local and domestic character. The federal government regulates matters between the State and foreign governments. There is, and can be, no conflict between the State and federal governments, if each will act within the sphere assigned to each. The necessity for States and local self-government is shown by the character of our people. The customs, habits, and thoughts of the people in one State differ widely from those of the people in another State, and this results in different laws.

The laws of this State provide that males of the age of seventeen and females of the age of fourteen years, not within the prohibited degree of consanguinity, are capable of entering into the contract of marriage. The statute provides that the following marriages are void; when one of the parties is a white person, and the other possessed of one-eighth or more of negro blood; and when either is insane or idiotic at the time of the marriage. Under the police power possessed by the States, they undoubtedly have the power to pass such laws. The people of this State have declared that they are opposed to the intermixture of races and all amalgamation. If the people of other States desire to permit a corruption of blood, and a mixture of races, they have the power to adopt such a policy. When the legislature of the State shall declare such policy by positive enactment, we will enforce it, but until thus required we shall not give such policy our sanction.

The subject is discussed with great ability, clearness, and force, by the Supreme Court of Pennsylvania, in the recent case of the Philadelphia and West Chester R. R. Co. v. Miles, 2 Am. Law. Rev. 358, wherein it said:

“The right to separate, being clear in proper cases, and it being the subject of sound regulation, the question remaining to be considered is whether there is such a difference between the white and black races within this State, resulting from nature, law and custom as makes it a reasonable ground of separation. The question is one of difference, not of superiority or inferiority.

Why the Creator made one black and the other white, we do not know, but the fact is apparent, and the races are distinct, each producing its own kind, and following the peculiar law of its constitution. Conceding equality, with natures as perfect, and rights as sacred, yet God has made them dissimilar, with those natural instincts and feelings which He always imparts to His creatures, when He intends that they shall not overstep the natural boundaries He has assigned to them. The natural law which forbids their intermarriage and that social amalgamation which leads to a corruption of races, is as clearly divine as that which imparted to them different natures. The tendency of intimate social intermixture is to amalgamation, contrary to the law of races.

The separation of the white and black races upon the surface of the globe is a fact equally apparent. Why this is so, it is not necessary to speculate; but the fact of a distribution of men by race and color is as visible in the providential arrangement of the earth as that of heat and cold. The natural separation of the races is therefore an undeniable fact, and all social organizations which lead to their amalgamation are repugnant to the law of nature. From social amalgamation it is but a step to illicit intercourse, and but another to intermarriage.

But to assert separateness is not to declare an inferiority in either; it is not to declare one a slave and the other a freeman; that would be to draw the illogical sequence of inferiority from difference only. It is simply to say, that, following the order of Divine Providence, human authority ought not to compel these widely separate races to intermix. The right of such to be free from social contact is as clear as to be free from intermarriage. The former may be less repulsive as a condition, but no less entitled to protection as a right. When, therefore, we declare a right to maintain separate relations, as far as reasonably practicable, but in a spirit of kindness and charity, and with due regard to equality of rights, it is not prejudice, nor caste, nor injustice of any kind, but simply to suffer men to follow the law of races established by the Creator himself, and not to compel them to intermix contrary to their instincts."

We fully concur in and indorse the doctrine above enunciated. It is quite clear to us, that neither the fourteenth amendment nor

the civil rights bill has impaired or abrogated the laws of this State on the subject of marriage of whites and negroes. The court erred in quashing the indictment.

The judgment is reversed, and the cause is remanded, with directions to the court below to overrule the motion to quash the indictment, and to place the appellee upon his trial for the crime charged in said indictment.

CHAPTER VIII.

EFFECT OF MARRIAGE ON THE PROPERTY RIGHTS OF THE PARTIES.

Earnings, Services and Society—The Husband's Right Under Statute.

FENEFF v. N. Y. CENT. & HUDSON RIVER R. R. CO.

203 Mass. 278, 80 N. E. 436, 24 L. R. A. (N. S.) 1024, 133 Am. St. Rep. 291. 1909.

Tort for the loss of consortium. Writ dated November 22, 1907.

The case came on to be tried before Gaskill, J. It appeared that the plaintiff was the wife of Antoine Feneff, who previously had brought an action for his own injuries and had recovered damages in accordance with an opinion of this court reported in 196 Mass. 575. By a stipulation of the parties it was agreed that the evidence introduced by the plaintiff was the same as that in the case of her husband. There was evidence in support of all the material allegations in the plaintiff's declaration.

At the close of the plaintiff's evidence, the judge ruled that the plaintiff could not maintain her action, and ordered a verdict for the defendants. The plaintiff alleged exceptions.

KNOWLTON, C. J. The plaintiff's husband was injured physically and mentally by the negligence of the defendants, and he has recovered full compensation for his injuries. Feneff v. Boston & Maine Railroad, 196 Mass. 575, 82 N. E. 705. The plaintiff sues for damages suffered by her from his injury, by reason of her relation to him as his wife. In her declaration she avers that, by reason of his disability, she has endured great suffering and anxiety, and has been obliged to assume heavy and arduous duties which she did not have to assume before the injury, and that she has lost the comfort, society, aid and assist-

ance of her husband. In her bill of exceptions she says that the action is "for the loss of consortium." This statement covers the case; for it is plain that the other averments in her declaration do not show an invasion of a legal right, nor anything more than a remote and consequential damage which did not result from any wrong done directly to her.

The right of consortium is a right growing out of the marital relation, which the husband and wife have, respectively, to enjoy the society and companionship and affection of each other in their life together. At the common law, the husband had a right to the labor and services of his wife, and in suing for the damages which are personal to the husband for an injury to his wife, he was permitted to recover not only for the expenses of her care and cure, but for his loss of her labor and services and the loss of consortium. *Kelley v. N. Y., N. H. & H. R. R.*, 168 Mass. 308, 46 N. E. 1063, 38 L. R. A. 631, 60 Am. St. Rep. 397, and cases there cited. It is said in that case, and in *Nolin v. Pearson*, 191 Mass. 283, 286, 77 N. E. 890, 4 L. R. A. (N. S.) 643, 114 Am. St. Rep. 605, that a wife could not maintain an action at common law for the loss of consortium of her husband. The reason of this was that she could not sue in her own name for a personal injury, and that a recovery for such a wrong could only be had in a suit brought jointly by her and her husband. The right to the consortium of the other spouse seems to belong to husband and wife alike, and to rest upon the same reasons in favor of each. Since the removal of the wife's disability to sue, this is now settled in most courts by a great weight of authority. *Nolin v. Pearson*, 191 Mass. 283, 77 N. E. 890, 4 L. R. A. (N. S.) 643, 114 Am. St. Rep. 605, and cases cited. It is now generally held, in accordance with the decision in *Nolin v. Pearson*, that, for a direct and intentional invasion of a wife's right of consortium by another woman, through the alienation of the husband's affections and criminal conversation with him, an action may be maintained, as a similar action may be maintained by a husband for a similar wrong inflicted through adultery with his wife. Formerly a wife could not maintain such an action, because her suit could only be brought by her husband, with whom she must join. The husband's own misconduct would ordinarily be a sufficient reason to prevent his bringing such an action, if, indeed, it would not bar him, in most

cases, from maintaining an action against a joint wrongdoer. The change of the statutes in this Commonwealth and similar changes in most other jurisdictions have given wives the same right as husbands to sue an offender for a wrong of this kind.

The wrong which may be redressed through such suits is one which has a direct tendency to deprive the husband or wife of the consortium of the other spouse. No case has been brought to our attention, and after an extended examination we have found none, in which an action for a loss of consortium alone has been maintained merely because of an injury to the person of the other spouse, for which the other has recovered, or is entitled to recover full compensation in his own name, when the only effect upon the plaintiff's right of consortium is that, through the physical or mental disability of the other; the companionship is less satisfactory and valuable than before the injury. The actions by husbands at common law for expenses and loss of services, in which the loss of consortium has been considered in estimating damages, were all in cases in which no damages could be awarded for loss of the ability to earn money and render services and be helpful to others, in an action by the husband and wife for the wife's personal damages, because at common law all these elements of damage belonged to the husband. See cases cited in *Kelley v. N. Y., N. H. & H. R. R.*, *ubi supra*. There was not an allowance to the wife for her loss of ability to earn wages and render services, and at the same time an allowance to the husband, in the form of compensation for the loss of consortium for the same diminution of ability to be helpful.

Where there is no intentional wrong, the ordinary rule of damages goes no further in this respect than to allow pecuniary compensation for the impairment or injury directly done. When the injury is to the person of another, the impairment of ability to work and be helpful and render services of any kind is paid for in full to the person injured. Ordinarily the relation between him and others, whereby they will be detrimentally affected by the impairment of his physical or mental ability, makes the damage to them only remote and consequential, and not a ground of recovery against the wrongdoer. It may be conceivable that one may have a contractual right to the labor or services of another, continuing after the time of his injury, such that, if his ability

is impaired, the contractor will be directly damaged. If there may be such a case it is unnecessary to consider whether the contractor with such a right should have his action for damages and receive his proper share of the amount allowable for the impairment of the other's earning powers, and the damages of the other be diminished accordingly. It is enough for the present case that persons whose relations to the injured party are purely domestic should not be permitted to share the compensation to which he is entitled for the impairment of his powers by the tort of another person, nor to receive an additional sum beyond the full compensation to which the injured person is entitled. Their damages are too remote to be made the subject of an action.

The minor children of an injured father who is legally bound to furnish them with support may suffer indirectly from his injury. So too may his wife, to whom he owes the same legal duty to furnish support; yet it was never held that a wife or minor child could recover for the consequences of a father's disability, against one who had negligently injured him. The diminished value of the husband's consortium with his wife, in such a case, is like the diminished value of the work that the husband can do for the support of his wife and the education and support of his minor children. The negligent defendant is supposed to have made full pecuniary compensation to the husband and father for his injury. In the benefit from this payment the wife and children may be expected to share to some extent. If they still suffer loss, it is not direct, but only consequential.

The case most relied on by the plaintiff, and the only one that comes near to supporting her contention, is *Kelley v. N. Y., N. H. & H. R. R.*, *ubi supra*. In that case actions of the husband and wife for an injury to the wife were tried together, and the damages in the two suits were assessed at one time by the same jury. It is said in the opinion that "it might be sufficient to dispose of this case to say that the plaintiff was bound to support his wife, and that the expenses incurred by him appeared to have exceeded the amount of the verdict, and that therefore the defendant's exceptions should be overruled." In assessing the damages the jury were permitted to consider the loss of consortium by the husband, and the court held that there was

no error. It seems from the verdict that the defendant suffered no injustice in the amount of damages awarded, and doubtless the court scrutinized less closely the narrow legal question involved than it would have done if it had been called upon to consider whether an action for loss of consortium alone could be maintained in a suit for negligence, when there had been a full recovery by the person injured for all the mental and physical effects of the injury. We are of opinion that in this class of cases there should be no recovery for loss of consortium, when the impairment of the powers and faculties of the plaintiff's spouse has been fully paid for in money. Indirectly, the plaintiff in such a case reasonably may be expected, through the same marital relation which gives a right of consortium, to be somewhat benefited by such a payment.

The doctrines stated in the case just cited are not to be applied to cases like the present, and to this extent the decision is overruled.

Exceptions overruled.

Earnings, Services and Society—The Wife's Right.

KROESSIN v. KELLER.

60 Minn. 372, 62 N. W. 438, 27 L. R. A. 685, 51 Am. St. Rep. 533. 1895.

COLLINS, J. This is an action brought by a married woman against one of her own sex to recover damages, following, in a general way, the common law form of declarations in crim. con. A general demurrer to the complaint was overruled in the court below, and by this appeal we are required to determine whether such an action can be maintained; the right to recover being based solely on alleged adulterous acts between plaintiff's husband and the defendant. It is to be noticed here that it is not alleged that the defendant was the seducer of the husband, or that plaintiff has been deprived of his support; nor is it an action for enticing the husband away, or for inducing him to abandon or desert his wife. We are quite safe in saying that at common law no such action could have been maintained. The injured husband alone brought crim. con., and he could sustain

the action by simply showing adulterous intercourse. The grounds on which the right to recover was based are well stated in Cooley on Torts, 224, and the principal elements were the disgrace which attached to the plaintiff as the husband of the unfaithful wife,—and no such disgrace has ever rested upon the wife, if there was one to the guilty defendant,—and, of more importance, the danger that a wife's infidelity might not only impose on her husband the support of children not his own, but, still worse, cast discredit upon the legitimacy of those really begotten by him. Because of these elements, the man was always conclusively presumed to be the guilty party. In the eye of the law, the female could not even give her consent to the adulterous acts, and, as a result, it was no defense in this form of action that the defendant had been enticed into criminal conversation through the acts and practices of the woman. From this statement as to the grounds or elements constituting this action, it will be seen that the principal ones cannot possibly exist or be involved in a similar action brought by a wife. And what has been said about the unavailability of the defense that the defendant himself was the victim and not the seducer, is suggestive of what the courts might have to hold to be the rule of pleading, and what they might have to inquire into, upon the trial of an action of this kind. Would it be held, following the old rule we have mentioned, and for which the reason seems well founded, that it was no defense for the female sued to allege and prove that she was the party seduced, and that the greater wrong and injury had been inflicted upon her, not upon the plaintiff wife, or would the contrary rule prevail? But we need not consider the subject further, for a moment's reflection will suggest the remarkable results flowing from the adoption of either rule.

We have been cited to quite a number of cases, determined in the courts of last resort in this country, in which it has been held, without much stress being laid on statutes concerning the rights of married women, that an action may be maintained by a wife against one who wrongfully induces and procures her husband to abandon or send her away. *Westlake v. Westlake*, 34 Ohio St. 521, 32 Am. Rep. 397, the court being divided in opinion, is a leading case on this view of the subject. A later one, announcing the same doctrine, but made to rest much more

on the married woman's acts in the state of Michigan, and similar to our own, is *Warren v. Warren*, 89 Mich. 123, 50 N. W. 842, 14 L. R. A. 545. The plaintiff's counsel has been industrious in collecting this class of cases in his brief, and to them we add *Price v. Price*, 91 Iowa 693, 60 N. W. 202, 29 L. R. A. 150, 51 Am. St. Rep. 360. But even on this proposition and despite broad statutory enactments affecting the rights of married women, the courts are not entirely agreed, for in Maine and Wisconsin it has been held that such an action cannot be maintained. *Doe v. Roe*, 82 Me. 503, 20 Atl. 83, 8 L. R. A. 833, 17 Am. St. Rep. 499; *Duffies v. Duffies*, 76 Wis. 374, 45 N. W. 522, 8 L. R. A. 420, 20 Am. St. Rep. 79. But we need not decide, as between these cases, for the exact question raised by the demurrer here was not the one under consideration in any we have cited. They were brought for enticing away the husband; causing him to withdraw his support from the wife; to abandon or desert her,—an entirely distinct and separate cause of action from that set out in the plaintiff's complaint. At common law this form of action was wholly different in pleadings and proof, as well as parties, from crim. con. It proceeded, and still proceeds, upon different grounds, and we do not regard cases of that nature as authority in this. We are not unmindful of the fact that plaintiff's counsel has presented two cases—*Seaver v. Adams*, 66 N. H. 142, 19 Atl. 776, 49 Am. St. Rep. 597, and *Haynes v. Nowlin*, 129 Ind. 581, 29 N. E. 389, 14 L. R. A. 787, 28 Am. St. Rep. 213—in which it is held that an action by a wife against another woman, based on a complaint very much like this, will lie. But in these cases the authorities before referred to are cited and relied on as directly in point. The courts rendering these decisions do not seem to have considered that there is, and inevitably must be, a marked distinction between an action charging a defendant with having induced and enticed a husband to withdraw his support from his wife to abandon and desert her and one similar to crim. con. We think the difference noticeable and material although we do not wish to be understood as holding that the one first mentioned will lie. That question is not before us, and we simply express our conviction that a wife would “seem to be better calculated to inflict pain upon innocent members of the families of the parties than to secure redress to the persons injured.” The

power to bring such actions would furnish wives “with the means of inflicting untold misery upon others, with little hope of redress for themselves.” We find nothing in our statutes in respect to the rights of married women which indicates that the power to proceed in this form of action was intended to be conferred. Attention has been called to Gen. St. 1894, § 5530 (Laws 1887, c. 207, § 1). We have heretofore had occasion to comment upon that act, and have not changed our views as then expressed. *Althen v. Tarbox*, 48 Minn. 18, 50 N. W. 1018, 31 Am. St. Rep. 616.

Order reversed.

CHAPTER IX.

DUTY OF THE HUSBAND TO SUPPORT WIFE.

Authority of the Wife to Pledge Husband's Credit.

DOLAN v. BROOKS.

168 Mass. 350, 47 N. E. 408. 1897.

Contract to recover the price of a dress furnished by the plaintiff to the wife of the defendant. The case was tried without a jury. There was evidence tending to support the claim. The defendant testified that he never had any business transactions with the plaintiff; that his wife had a separate income from which for about ten years she had paid for her clothing; that she had traded with plaintiff for three or four years, paying her bills with her own checks, but that he had paid for some clothing contracted for by his wife; that he paid substantially all the bills for the maintenance of his household except the clothing bills for his wife and daughters. The wife's previous purchases from the plaintiff had been paid for by the wife with her own checks.

At the close of the evidence the plaintiff requested the judge to rule among other things, as follows: That the fact that the wife had a separate income—such fact being uncommunicated to the plaintiff—does not release the husband from his liability to pay for goods suitable to the wife's station in life, supplied by the plaintiff to the wife while husband and wife were living together.

With respect to this request the judge ruled that the non-communication to the plaintiff of the fact that the wife had a separate income was immaterial. The judge found for the defendant and the plaintiff excepted.

MORTON, J. * * * It is not contended that the wife had express authority from the defendant to purchase the dress. The plaintiff relies on the obligation which a husband is under

to furnish his wife with necessaries suitable to her station in life, and on the authority which she has by law, in case of his neglect to do so, to purchase them on his credit. The question is whether, under the circumstances of this case, the defendant is liable on that ground. A wife has not authority to purchase on her husband's credit such clothing as she deems suitable and proper. Generally speaking, it is only in cases of necessity that the law constitutes her his agent with authority to pledge his credit. This is the law in England, as well as here. *Raynes v. Bennett*, 114 Mass. 424; *Conant v. Burnham*, 133 Mass. 503, 43 Am. Rep. 532; *Debenham v. Mellon*, 6 App. Cas. 24; *Jolly v. Rees*, 15 C. B. (N. S.) 628. It is possible that the husband's consent to or acquiescence in the doing of certain things by the wife may constitute her his agent *quoad* such matters. Such an agency may be presumed, perhaps, under some circumstances, in regard to those things relating to the family, for instance, which it is usual for the wife to do, and which she does without any question or objection on the part of her husband. *Debenham v. Mellon*, *ubi supra*. This case, however, as already observed, stands on a different ground from either of those just referred to.

The defendant and his wife were living together, and he paid all the expenses for the maintenance of the household, except those for the clothing of his wife and daughters. The bulk of those was paid by the wife out of her income. She had been accustomed for ten years to do this, though the defendant had paid some bills for clothing contracted by her in his name. For aught that appears, her income was sufficient to clothe her suitably according to her station in life, and it fairly may be assumed that it was understood between them that it should be used by her in this manner. We do not see how, under such circumstances the defendant can be held liable. Assuming that the dress was suitable according to her station in life, it does not appear that the defendant had refused or neglected to provide his wife with suitable clothing, and consequently one of the essential grounds in which the law raises an agency in the wife's favor to bind the husband was wanting. Further, the judge who heard the case may have found that, although the dress was suitable, it was not necessary.

We do not mean to intimate that the fact that a wife has an

income of her own relieves the husband from his obligation to support her, or absolves him from liability for suitable clothing bought by her in consequence of his refusal or neglect to provide it for her. It is not necessary to decide that question now. See *Thorpe v. Shapleigh*, 67 Me. 235; *Liddlow v. Wilmot*, 2 Stark. 86.

The rulings asked for assumed in one form or another that the defendant was liable. As we do not think that he is, it is unnecessary to consider them in detail. The modifications which the judge made in the fourth and sixth rulings asked for were rightly made.

Exceptions overruled.

Changes Produced By Statute—Family Expense.

HYMAN v. HARDING.

162 Ill. 357. 1896.

CARTWRIGHT, J. In November, 1888, Adelaide Harding, wife of defendant in error, purchased a ring of plaintiffs in error, and suit was brought against both husband and wife for the purchase money. Plaintiff's declaration consisted of the common counts in assumpsit and a special count under the statute, making both husband and wife chargeable with family expenses. On the trial the common counts were withdrawn from the consideration of the jury. On the claim under the statute the verdict of the jury was against both defendants, and judgment was entered accordingly. Defendant in error alone appealed, and the judgment was reversed, without remanding, by the Appellate Court, which found as a matter of fact, and entered in its judgment that the purchase price of the ring was \$575, that it was a ruby and diamond ring, and that it was purchased without authority from the husband. A certificate of importance having been granted, the cause was brought to this court.

On the trial Adelaide Harding, co-defendant with her husband, was permitted to testify against his objection, and she testified that the diamond setting was lost from her wedding ring, which originally cost \$65, and that she had the ring re-set with diamonds and a ruby, costing \$575, and it is insisted that the

preservation of the wedding ring is a different class of expense from the purchase of an ordinary ring. But this testimony was incompetent and erroneously admitted. The court said that it was admitted only to bind her; but the action was a joint one against the husband and wife, and there could be no verdict against one without the other. Whatever would tend to establish the claim and conduce to a verdict against her would affect him in like manner. There was no competent evidence that any part of the ring sued for had ever been part of a wedding ring, and it must be treated as any other ring, for mere personal gratification and adornment.

Section 15 of chapter 68 of Hurd's Statutes is as follows: "The expenses of the family and of the education of the children shall be chargeable upon the property of both husband and wife, or either of them, in favor of creditors therefor, and in relation thereto they may be sued jointly or separately." Under the findings of fact by the Appellate Court, the inquiry in this court is whether a ring is a family expense.

The statute has been construed in Iowa, from which State it was taken, and elsewhere, to embrace merely legitimate expenses of the family, as such, incurred for articles to be used in the family, and actually used or kept for use therein. (*Fitzgerald v. McCarty*, 55 Iowa 705). The term "expenses of the family" is not synonymous with "necessaries," which may be personal and individual as well as for the family. It does not include business expenses, which are incurred merely to secure the means to maintain the family, nor private or individual expenses, which do not affect the collective body of persons under one head constituting a household or family, but it does include expenses for many articles used by individual members of the family, if they mutually affect the members generally. It is apparent that even though an article is purchased for and used by only one member of the family, yet it is a family expense if it conduces, in any substantial manner, to the welfare of the family generally. Musical instruments may be as pleasant and beneficial to the other members of the family as to the operator. Books, pictures and articles of ornament used to adorn and beautify the home, though owned by individual members of the family, are beneficial to the family generally, and tend to maintain its integrity. Articles of clothing, though purchased

for and used exclusively by individual members, are family expenses, as they contribute, in a substantial manner, by preserving health and otherwise to the general well being of all the members. It is equally apparent that an article is not a family expense if it in no way conduces to the welfare of the family generally, even though at times it is used or displayed by the one for whom it was purchased in the family. We think that a ring falls within this class. It is for personal adornment, largely to gratify vanity, and, though it may be incidentally worn in the family, its primary and important use is for display in general society.

The case of *Marquardt v. Flaughter*, 60 Iowa 148, is cited by plaintiffs in error; but in that case, which involved a watch and chain, a ring and some other jewelry, neither the lower court nor the Supreme Court held that the ring was a family expense. The judgment in the lower court was of such an amount that it is a warrantable inference that it did not include the ring, while the Supreme Court impliedly, if not directly, stated that the ring was not a family expense. As to the watch and chain, it may be said that a watch is, primarily at least, for use, and in the family as much as elsewhere. It is usually beneficial to the family, as such, though worn only by one, while a chain may be, in prudence, a proper adjunct to a watch.

It is insisted the cause should have been remanded by the Appellate Court to enable plaintiffs to try the cause on the common counts; but as the common counts were withdrawn on the trial, the only question related to the liability for expenses of the family, and this, we think, the Appellate Court properly determined, and its judgment will be affirmed.

Judgment affirmed.

CHAPTER X.

CONTRACTS OF MARRIED WOMEN.

In Equity.

YALE v. DEDERER.

22 N. Y. 450, 78 Am. Dec. 216. 1860.

SELDEN, J. * * * To dispose of this case, therefore, we have only to ascertain whether a married woman having, prior to the statutes of 1848 and 1849, a separate equitable estate, could create a charge upon the estate, by giving a promissory note for the debt of her husband, intending thereby to charge her estate, but without indicating this intention in any manner by the contents of the note. It was settled, when the case was here before, that the bare giving of such a note did not bind the estate. It becomes necessary now to inquire whether the additional fact, that the wife, at the time of making the note, intended to charge her separate estate, changes the rule.

Much has been said, in the course of the decisions on this subject, in regard to the intention of the wife at the time of making the contract; and in order properly to appreciate the force of these remarks, a brief retrospect of the law of separate estates is required. I shall not attempt a review of the cases, confused and contradictory as some of them are, but desire to call attention to one or two features of the controversy carried on in the English courts for nearly a century, and which can hardly even now be considered as ended, in regard to the effect of the contracts of married woman upon their separate estates. If the instrument by which the estate was created, conferred upon the wife either a general or qualified power of disposition, no one ever questioned her rights to execute this power; the doubts which arose, related to her right to dispose of or charge the property, independently of any such special authority; and this right was established soon after the introduction of such estates.

upon the ground that the right of disposal was a necessary incident of the right of property.

That this universal *jus disponendi* was the sole and only foundation of the right in question is clear. Lord Thurlow, in the case of *Fettiplace v. Gorges*, 3 Bro. C. C. 8, places the right upon this ground, and no other basis has ever been suggested for it. Assuming this then to be the foundation of the right, it is plain that the wife, to avail herself of it must make some disposition of the specific property itself. It is clearly impossible to deduce, from the *jus disponendi*, which accompanies all rights of property, power to make any contracts, except such as related directly to the property to which the right of disposition is attached; and yet the Master of the Rolls, in *Norton v. Turvill*, 2 Pr. W. 144, and in *Standford v. Marshall*, 2 Atk. 69, held the separate estate of a married woman liable for the payment of her bond, although the bond in no manner referred to such separate estate; and in the latter case was given for the money lent to the husband.

The reasoning upon which these cases are said to have proceeded, and upon which they were followed by Lord Thurlow, was this: That it being the rule in equity, that a wife who had a separate estate might deal with such estate in the same manner as if she were sole: it followed that such estate was liable for her engagements, in the same manner as it would be if she were a feme sole. The equitable rule, which being founded entirely in the right of the wife to dispose of her property, could go no further than to allow her to make contracts specifically appropriating or charging her separate estate, was thus expanded, so as to enable her to contract generally without in any manner referring to such estate. The doctrine was justly characterized by Chancellor Kent in the case of the *Methodist Episcopal Church v. Jaques*, 3 Johns. Ch. 77, where, speaking of the two cases to which I have referred, among others he says: "It is difficult to perceive upon what reasoning or doctrine the bond or parol promises of a feme covert could for a moment to be deemed valid. She is incapable of contracting according to the 'common right', mentioned by Lord Macclesfield; and if investing her with separate property, gives her the capacity of a femme sole, it is only when she is directly dealing with that very property. The cases do not pretend to give her any of the

rights of a feme sole in any other view, or for any other purpose."

But, although Lord Thurlow followed, as we have said, what he supposed to be the rule established by the cases referred to, he nevertheless saw the fallacy upon which those cases were based, as appears by his remarks in the case of *Hulme v. Tenant*, 1 Bro. C. C. 16, the leading case on this subject. There the separate estate of a wife was held liable for the payment of her bond given for money borrowed by her husband, and the residue by herself. After referring to the previous cases, Lord Thurlow says: "I take it, therefore, it is impossible to say, but that a feme covert is competent to act as a feme sole with respect to her separate property, when settled to her separate use; but the question here goes a little beyond that; it is only how far she may act upon her separate property. I have no doubt about that; but the question is, how far her general personal engagements shall be executed out of her separate property." Still, although thus clearly seeing the distinction which ought, as it would seem, to have been decisive against the claim; he, nevertheless, yields to the authority of the previous case, and holds the separate estate liable.

The debt in the last case, as well as in the previous cases of *Norton v. Turvill*, and *Standford v. Marshall*, was by bond. But it is obvious, that if the principle upon which they were based was sound, it embraced every debt of the wife, however created; whether by bond, note, or by a mere oral promise; and so the doctrine was subsequently applied by Lord Thurlow himself in the case of *Lilia v. Airey*, 1 Ves. 277. It is true, that in this case the separate estate consisted of a specific sum allowed by the husband to the wife, by way of separate maintenance, and resort has been sometimes had to that fact as explaining the decision. But no reliance is placed upon this circumstance by Lord Thurlow, nor could it properly affect the result. The decision was the legitimate consequence of the theory of the wife's liability adopted in the previous cases.

But the unsoundness of this theory was soon discovered, and it was rejected two years afterwards, in the case of *Bolton v. Williams*, 2 Ves. 139, by Lord Chancellor Loughborough, who denied the liability of a married woman's separate estate for her general parol engagements, and explained the previous cases

upon the ground, that the securities which the wife had executed operated as appointments of her separate property, that is, as appropriations or pledges of such property for the payment of the debt for which the security was given.

This new theory that a written security was an appointment was as plainly erroneous as that for which it was substituted. It was evidently a pure fiction. The doctrine proceeded upon the assumption that a wife's separate estate is not liable for her general engagements, but only for such as are specifically charged upon it, and yet held it liable for a bond or note, which in no manner referred to such estate. If these written securities operated as appointments, then it must necessarily follow that every such security would create an equitable charge or lien upon the estate, from the time of its execution; still, they were uniformly treated not as specific liens, but as mere general debts, having no priority over other and later claims. It was expressly held by Sir John Leach, Master of the Rolls, in an anonymous case (18 Vs. 258), where the questions arose, that in such cases there was no priority, and that all the debts must be paid equally.

But, notwithstanding these inconsistencies, this doctrine that a written security was an appointment and a charge, while it was otherwise with a mere parol promise, was maintained substantially unchanged, from the time of its introduction by a Lord Loughborough, in *Bolton v. Williams*, until the case of *Murray v. Barlee*, 4 Sim. 82, when Lord Brougham rejected the distinction between a written security, and a promise by parol, and extended the rule so as to make the mere parol engagements of a wife a charge, as well as her bond or note. Speaking on that subject, he says: "I own I can conceive no reason for drawing any such distinction. If, in respect of her separate estate, the wife in equity is taken as a feme sole, and can charge it by instruments absolutely void of law, can there be any reason for holding that her liability, or more properly, her power of affecting the separate estate, shall only be exercised by a written instrument? Are we entitled to invent a rule, to add a new chapter to the statute of frauds, and to require writing where the act requires none? Is there any equity reaching written dealings with the property which extends not also to dealing in other ways, as by sale and delivery of goods? Shall necessary supplies for her maintenance not touch the estate, and yet money

furnished to squander away at play, be a charge on it, if fortified by a scrap of writing? No such distinction can be taken upon any conceivable principle."

It is impossible to deny the force and conclusiveness of this reasoning. The distinction which it combats, was clearly untenable. But the learned Chancellor was, I think, less successful in another part of the same opinion in which he attempts to explain the ground upon which it had been previously held, that the bond or note of a married woman, and upon which he held that all her engagements, whether in writing or by parol, were charged upon her separate estate. He says that although originally the courts supposed that, to affect the separate estate, there must be some real charge, as a mortgage, or an instrument amounting to the execution of a power, afterwards the intention of the wife "was more regarded, and the court only required to be satisfied that she intended to deal with her separate property." The reasoning by which her intention was supposed to be established was, that when a married woman gives her bond or note, or contracts a debt in any other manner, it must be presumed that she intended it to have some effect; and inasmuch as it is void at law, and can have no effect unless it is a charge upon her separate estate, it follows that she must intend it to be such a charge.

The intention here spoken of is not an intention which is proved by extraneous evidence dehors the contract, but an intention which is to be inferred from, and is therefore embraced in or manifested by, the contract itself. No court has ever held or intimated that parol evidence was admissible to prove that the bond or note of a feme covert was intended to be a charge upon her estate. To permit this would be in direct conflict with the rule which excludes all parol evidence offered to explain a written instrument. The intent, to be of any importance, must be a part of the contract: that is, the true meaning of the contract when justly interpreted must be, that the debt which it creates should be a charge upon the estate. This case, therefore, is not materially strengthened on the part of the plaintiff by the finding of the judge, that the defendant intended the debt to be a charge, as that intention, if it existed, forms no part of the note, which must be regarded as the only evidence of the contract.

But the reasoning of Lord Brougham in *Murray v. Barlee* has been since overthrown, and the doctrine based upon it is not now the doctrine of the English courts. In the case of *Owens v. Dickenson*, 1 Craig. & Ph. 48, Lord Chancellor Cottenham appears to have seen that there could be no real foundation for the assumption that because a married woman had executed a bond or note, or contracted a debt in any other form, therefore she must have intended to charge such debt upon her separate estate. He first shows, what, indeed, is very plain, that if the doctrine is sound, then every debt must become a specific lien upon the separate estate to be paid in the order of its priority: while Lord Brougham held that such debts are all to be *pari passu*. He then argues, very conclusively, to prove that a contract which is entirely silent as to the separate estate, and makes no reference whatever to its existence, cannot by any legal reasoning be shown to have been intended as a disposition of such estate.

After thus removing the only ground upon which every English Chancellor, from Lord Loughborough to Lord Brougham, had held a bond or note, and upon which the latter had held every other contract to create a charge, Lord Cottenham proceeds to inaugurate an entirely new doctrine on the subject, which is, that equity lays hold of the separate property, and appropriates it to the payment of the debt; not on account of anything contained in the contract; not because the wife, by any agreement, either express or implied, has made the debt a charge; but for reasons which I will give in the learned Chancellor's own words: "The separate property of a married woman, being a creature of equity, it follows, that if she has a power to deal with it, she has the other powers incident to property in general, namely: the power of contracting debts to be paid out of it; and inasmuch as her creditors have not the means at law of compelling payment of those debts, a court of equity takes upon itself to give effect to them, not as personal liabilities, but by laying hold of the separate property, as the only means by which they can be satisfied."

This is by no means a return to the primary doctrine of the English courts on this subject. Lord Thurlow never suggested that equity had any power to take the separate property of a married woman and appropriate it to the payment of debts

which she had never in any manner charged upon it. It is an attempt to support, by an entirely new process of reasoning, a course of decision which Lord Cottenham plainly saw could not be sustained upon any of the grounds upon which it had been previously placed.

But whether we adopt this last phase which the shifting doctrine in respect to wife's separate estate has assumed or not, it is certain that the judgment in the present case cannot be upheld. As was shown by Judge Comstock when this case was here before, mere equity, not resting upon any positive contract, will never seize upon the separate estate of the wife, and appropriate it to the payment of a debt of the husband, for which she is mere surety; and it follows from what has been previously said, that the estate of the defendant cannot be held liable upon this note, upon the ground that she intended to make it a charge; because to make such an intent of any importance, it must be either expressed or implied in the terms of the contract.

But I am unwilling to leave it to be inferred that I assent to the doctrine of Lord Cottenham. It seems to me even less defensible than the theories which preceded it. Those theories conceded, that the separate estate of a feme covert could not be appropriated in payment of her debt, unless she voluntarily charges such a debt upon her estate. Their error consisted in raising an implication of an actual appointment of charge upon wholly insufficient grounds. But Lord Cottenham's doctrine denies the necessity of any intentional charge of the debt at all by the wife upon her separate estate, although it at the same time makes her power to dispose of that estate the basis of its liability. His argument, when reduced to its simplest terms is, that a married woman who has a separate estate, has power in equity to charge any debt she may incur upon such estate; and inasmuch as the general creditors of such married woman, whose debts have not been thus charged, have no other means of collecting them, equity takes hold of the separate estate, and appropriates it to their payment.

Can this be sound? I am unable to see any logical connection between the premises and the conclusion. It may be very just, abstractly considered, that equity should thus dispose of the estate; but it is clearly impossible to deduce the doctrine from the *jus disponendi* of the wife, which is its only foundation.

The truth would seem to be that this mode of dealing with the estates of married women, to the extent to which it has been carried by the English courts, could not be sustained by any process of legal reasoning, and hence the grounds upon which it was made to rest have been repeatedly changed, and the rule itself has been fluctuating and uncertain.

These views are not new. Judge Story, in his work on Equity Jurisprudence, says: "It has been remarked, that this rule of holding that a general security, executed by a married woman, purporting only to create a personal demand, and not referring to her separate property, shall be intended as *prima facie* an appointment or charge upon her separate property, is a strong case of constructive implication by courts of equity, founded more upon a desire to do justice, than upon any satisfactory reasoning."

The courts of this State have never, as yet, adopted the doctrines of the English Court of Chancery on this subject; certainly not to their full extent: and it would in my view be inexpedient now to do so, for various reasons. If we attempt to follow a class of decisions which obviously rest upon no solid basis of principles, we can never arrive at any settled conclusion.

The views of Lord Cottenham are no more likely to be permanent than those of his numerous predecessors. Some future Lord Chancellor may detect the fallacy of his reasoning as he detected that of Lord Brougham. No rule can ever be stable, the reasons given for which are constantly changing. If we desire precision and certainly in this branch of the laws, we must recur to the foundation of the power of a *feme covert* to charge her separate; and this has heretofore arisen solely from her incidental power to dispose of that estate. Starting from this point, it is plain, that no debt can be a charge which is not connected by agreement, either express or implied, with the estate. If contracted for the direct benefit of the estate itself, it would, of course, become a lien; upon a well founded presumption that the parties so intended and in analogy to the doctrine of equitable mortgages for purchase money. But no other kind of debt can, as it seems to me, be thus charged without some affirmative act of the wife evincing that intention; and there is no reason why her acts in this respect should not be

tested by the same principles and rules of evidence which are applied to similar questions in other cases.

But there is a strong additional reason why this court should decline at this time to adopt the fictitious theories in this subject which have so long prevailed in the English courts. Married women are not hereafter to be indebted to equity merely for protection in the enjoyment of their separate estates. They hold them by a legal title and have a legal right to dispose of them. The acts of 1849 and 1860 are henceforth, if not repealed, to be the source of their power over such estates. There is no longer any foundation for the argument, that as equity creates and protects these estates, equity has a right to control them. Rules, therefore, which have grown up under this idea, which I regard as to some extent illusory, will be hereafter entirely inappropriate. I shall not attempt at this time to put a construction upon those acts. That of 1860 authorizes married women to carry on any trade or business upon their own account; but with this exception, the only contracts which it empowers them to make, are those which have direct reference to their separate property: and even this power, where the property consists of real estate, is subjected to a very important restriction; the consent in writing of the husband, or the authority of a court, being rendered essential to its exercise.

These provisions show that the legislature has not even now intended to remove the common law disability of married women to bind themselves by their contracts at large. To be obligatory upon them or their estates under our latest statute, their contracts must relate entirely to their separate property, or to the particular trade or business in which they are engaged. This legislation harmonizes with the views I have advanced in regard to the effect of the contracts of married women. It lends no countenance to the idea that the mere possession of separate estates renders their contracts having no relation to such estates binding upon them. It would be impossible, as it seems to me, to hold, under our statutes, that the mere execution of a security by a married woman not connected by agreement with her estate could be a charge upon it; and yet the power of disposal conferred by these statutes, is, to say the least, as complete as that previously possessed by married women by virtue of the *jus disponendi*, which resulted from mere ownership. There would,

therefore, be a manifest incongruity in holding, in the present case, that prior to our late statutes the debt of a feme covert not connected with her separate estates, not in any manner charged by contract upon it, could be enforced against it, and then deciding, as we evidently must, that under those statutes an actual charge is necessary.

The judgment of the Supreme Court should be reversed, and there should be a new trial, with costs to abide the event.

All the judges concurred; COMSTOCK, C. J., and DENIO and BACON, JJ., upon the ground that the case as now presented did not vary from that when here before. A majority concurred in the opinion that the intention to charge the separate estate must be stated in the contract itself, or the consideration must be one going to the direct benefit of the estate.

Judgment reversed, and new trial ordered.

CHAPTER XI.

CONVEYANCES AND DEVICES OF MARRIED WOMEN.

Conveyances—at Common Law.

LANE v. SOULARD.

15 Ill. 123. 1853.

The bill alleges: That Soulard conveyed certain property in St. Louis to trustees, to hold in trust for appellant, a married woman, provided she shall pay out of her separate estate, the sum of \$9,000, payable in four installments; that said Soulard agreed to complete the improvements then in progress, by the 1st of October, 1846; that to secure the payment of the first installment more fully, being \$2,000, to be paid 1st October, 1846, the appellant and her then husband executed a deed of trust to a part of the defendants, as trustees for certain lands in Illinois, owned in her right, which authorized the sale of said lands, on the failure to pay said first installment, and out of the proceeds to pay, first, the cost, and then the sum of \$2,000; that upon the failure to pay any or all of the installments, or the interest, out of the separate estate of said Margaret B. Lane, the property in St. Louis should be sold for the payment thereof.

That said Soulard failed to complete said improvements in the time and according to his contract, and that, at the March term of the St. Louis circuit court in the year 1851, said Soulard obtained a decree for the sale of the property in St. Louis, under which decree said property was sold, and purchased by said Soulard for the sum of \$6,600; that said first installment formed a part of said decree, and that the proceeds of said sale ought to be applied to the discharge of said installment, that she was a married woman at the time of the execution of the deed of trust for lands in Illinois; that the consideration of the deed of trust had failed, and that it would not be just to allow Soulard to enforce the payment and still hold the property in St. Louis.

The bill further charges that her land has been sold for taxes, and calls upon the court to require the trustees to proceed at law to recover said property, and to enjoin the sale until the title is settled. The answer admits the contract as set out by appellant, alleges that he has completed his contract, admits the proceedings in St. Louis, and sets up the decree in St. Louis as conclusive as to the amount due—to which there is a replication.

This cause was heard before UNDERWOOD, Judge, at August term, 1853, of the St. Clair Circuit Court.

CATON, J. Although many points were raised and ably argued in this case, we shall confine ourselves in the decision to one single question, which is unavoidably decisive of the whole case. The Revised Statutes repealed all the former laws on the subject of conveyances of real estate, and authorized married women within this State to convey their land by joining with their husbands and acknowledging the deeds in a specified way; but no authority was given for married women residing out of this State to convey their lands lying within it. The law thus continued till the act of the 22d of February, 1847, which authorizes married women without the State to convey their lands lying within this State.

In April, 1846, Mrs. Lane, with her husband, executed this deed of trust, in the city of St. Louis, where she then resided. The deed of trust conveys the premises in question to certain trustees, to secure the payment of certain moneys to Soulard. The question is, whether this was a valid conveyance of the premises. We shall not stop to adduce authorities to show, that a feme covert cannot, except she be authorized by an express statute convey her fee-simple title to real estate by deed. She is incapable of doing so at the common law, and hence there can be no law for it, unless it be by statute. Without a statute, she is incapable of conveying by deed as she is by word of mouth. From 1845 to 1847, there was no statute enabling married women, without the state to convey their lands within it. This deed having been made without the authority of law, and against law, was simply void; as void as if it had been expressly prohibited by a positive statute. The second section of the law of 1847, provides that a feme covert not residing in this State, being above the age of eighteen years, may join her husband

in the execution of deeds, &c., of lands lying within this State, and that she shall thereby be barred of her right in like manner as if she was sole, and the acknowledgment of such deed may be made in the same manner as if she was sole, and the section concludes: "And the provisions of this section shall apply to deeds, mortgages, conveyances, powers of attorney, and other writings, heretofore, as well as those which may hereafter be executed." The third section provides that such deeds, &c., which had been or might thereafter be executed without the State and within the United States, and acknowledged or proved in conformity to that statute, should be admitted to record, and read in evidence without further proof. Admitting that here was the deliberate purpose on the part of the legislature, to give effect to conveyances made by married women out of the State, during the two years when they were not authorized to make such conveyances, and the question arises, Had they authority to make such deeds operative? We cannot bring our minds to entertain a doubt that the legislature had no such authority. Notwithstanding this deed of trust, Mrs. Lane was, on the 21st of February, 1847, as much the absolute owner of this land as if she had never made such a deed. That deed affected her right to it in no way whatever, any more than if it had continued a blank piece of paper, or her name had been forged to it by another, instead of being written by herself. She was no more authorized by law to put her name to that deed, so far as giving it effect was concerned, than a stranger had to write it for her. If the legislature could give effect to a deed thus executed against the provisions of the law, then they could make a deed at once which would convey the title. If they could by force of law make her title pass where none had passed before, then it is the law which passes the title and not the deed. It is the act of the legislature and not her own act, which deprives her of her land. If, on the 1st of February, she was the absolute owner of this land, unaffected, uninfluenced, unprejudiced by any thing which she had previously done or suffered, and on the 23rd of February, she had ceased to own it, by whose act had the title passed? Not by her own act, certainly, for she had done nothing in the meantime or previously, which could transfer the title. How then had it passed? By the act of the legislature alone. She had not done it, for she could not in any

way, shape, or form, pass the title; but the legislature had taken her land from her and given it to others. This they are expressly prohibited from doing, by the constitution.

In support of the constitutionality of this law, we have been referred to several decisions in Pennsylvania, and in some other States, and in the Supreme Court of the United States. Nor is this the first time that our attention has been called to these cases. Without, at the present time, expressing any opinion upon the propriety of those decisions, it is sufficient to say, that they are upon cases not like this; but to sustain this law we should have to go further than any of these courts have gone, in sustaining legislative control over titles to real estate. Indeed, the protection intended to be secured by the constitution would be quite thrown down, and they would be left to dispose of the titles of individuals as they please. In those cases the law had authorized the parties to convey, but the conveyances had been imperfectly executed or acknowledged, and the curative laws had been passed to remedy such defects, and to confirm contracts which had been authorized by law to be made. Upon this ground all those decisions were made. But the case before us is quite different. Here, the law authorized no such contract whatever. In each of those cases there was an imperfect or defective execution of a power. Here is a total want of power. There, there was a capacity to act and an attempt made to exercise that capacity. Here was a total incapacity to act, and whatever was attempted to be done, was in direct violation of the law. Here, the party had attempted to do nothing which the law had authorized her to do. Here, there was no defect to remedy, but the entire act was void, not for the want of form, but for the want of power; and we are very clearly of opinion that the legislature could not give effect to a conveyance, which the law prohibited her from making, and thus transfer a title by the mere farce of a legislative act.

The decree of the circuit court must be reversed, and a decree entered in this court, enjoining the trustees named in the deed of trust from proceeding to sell under that deed.

Decree reversed.

CHAPTER XIII.

TORTS AND ANTENUPTIAL LIABILITIES.

Liability of Married Women for Torts and Crimes— In General.

KOSMINSKY v. GOLDBERG.

44 Ark. 401. 1884.

SMITH, J. This action was against the husband alone for defamatory words spoken by the wife. The complaint did not show whether the defendant was present or absent at the time the slander was uttered; and a demurrer to it was sustained for non-joinder of the wife. The plaintiff proposed to amend by stating that the injurious words were spoken in the presence and hearing of the husband; but the amendment was stricken out. By this action we understand the court to have decided that the amendment stated no case materially different from that which had already been adjudged insufficient, and to have insisted that the wife be brought in as a party. The plaintiff declining to plead further, and electing to rest on his amended complaint, final judgment was entered dismissing the action.

For the wife's torts, committed during coverture, the husband is responsible. Such torts may be committed under either of the following circumstances: (1) Where the husband is absent and had no knowledge of the intended act, as in *Head v. Briscoe*, 5 Carr. & Payne, 484, 24 E. C. L. R. 667, where a man was held answerable for a libel published by his wife, although they were permanently living apart. See, also, *Catterall v. Kenyon*, 3 Q. B. 309, 40 E. C. L. R. 749. (2) Where the husband is absent, but where the tort is done under his direction and instigation, as in *Handy v. Foley*, 121 Mass. 259, 23 Am. Rep. 270. (3) Where the husband was present, but the wife acted of her own volition, of which *Cassin v. Delany*, 38 N. Y. 178, is an example. And (4) where the tort is committed in the com-

pany of the husband, and by his command or encouragement; for instances of which see *Daily v. Houston*, 58 Mo. 361; *Brazil v. Moran*, 8 Minn. 236 (Gil. 205), 83 Am. Dec. 772.

In the first three cases they are jointly liable, and the wife must be joined. She is in reality the offending party, and if the marriage should be dissolved by divorce or the death of either spouse before judgment recovered, the liability of the husband ceases. He is joined because she cannot be sued alone. But in the last case supposed, the law considers the tort as committed by the husband, and he alone is liable. To exempt her from liability, however, requires the concurrence of his presence and his command. A wrong done by his direction, but not in his company, does not excuse her; nor does his presence, if unaccompanied by his direction. The rule is stated too broadly in 2 Kent's Com. 149, where it is said, "If committed in his company, or by his order, he alone is liable."

Here the injury is alleged to have been done in the husband's presence, but not at his instigation. Yet his presence raises a presumption that she was acting under compulsion. And therefore the complaint states *prima facie* a cause of action against him alone. Of course this presumption may be rebutted by proof that he did not authorize or influence her act. *Pomeroy's Remedies*, § 320; *Bliss on Code Pleading*, § 85.

The presumption of coercion, arising from the mere presence of the husband in the case of crimes, has been abolished by statute, and the excuse has been left to be made out by proofs. *Gantt's Dig.* § 1233; *Edwards v. State*, 27 Ark. 493.

Judgment reversed, with directions to require defendant to answer the amended complaint.

CHAPTER XVI.

DIVORCE AND ALIMONY.

Grounds—Cruelty.

MOSHER v. MOSHER.

16 N. D. 269, 113 N. W. 99, 12 L. R. A. (N. S.) 820, 125 Am. St. Rep. 654. 1907.

Action by Alfred Mosher against Eugenia Mosher. Judgment for plaintiff, and defendant appeals. Affirmed.

SPALDING, J. Action by Alfred Mosher against Eugenia Mosher for divorce, on the ground of extreme cruelty, consisting in intentionally worrying and annoying the plaintiff, and pursuing a systematic course of ill treatment, using profane language, and telling obscene stories, and other acts, all of which are alleged to have caused the plaintiff grievous mental suffering. The defendant denies these charges, and asks affirmative relief, charging the plaintiff with failing to provide her with the necessities of life, and with repeatedly accusing her of having married him from mercenary motives, and of having loved other men and of her having illicit intercourse with other men. * * *

The plaintiff was a religious man, had been a church member for 35 years, and did not tolerate profanity or vulgarity in his family. One of the principal charges against the defendant was that she was very profane in her conversation in the presence of the plaintiff, and sometimes of third parties, and that she repeatedly told in his presence, and in the presence of his children, obscene stories, some of which are related by witnesses, and it is charged that these were the cause of grievous mental suffering on the part of the plaintiff, and the trial court so found. We cannot assume that the finding of the trial court is erroneous in the absence of evidence to the contrary. Whether the telling of obscene stories and the use of profanity by the

wife in the presence of the husband and others is the cause of grievous mental suffering on the part of the husband depends very largely upon the temperament, religious training, and characteristics of the man, and his degree of sensitiveness to such improprieties. We can imagine a man whose moral nature may be so inactive as to render such conduct on the part of the wife inoffensive, but we think a great majority of men would be humiliated and chagrined by such conduct, which would cause in most cases more grievous mental suffering than other acts more violent in their nature. The evidence on this subject, taken as a whole, we think clearly indicates that it had the effect on the plaintiff which might be expected in a man of ordinary sensibilities and of a high standard of propriety. No general rule can be laid down on this subject, but each case where charges of this nature are made must be governed by its own peculiar facts.

Many other acts are shown to have been committed by the defendant, some of them trifling, and the most of them so, but occurring as they did, at short intervals, in the way they did, they constitute a continuous course of conduct intended to aggravate and annoy the plaintiff. We shall not enter into details regarding these acts, as to do so would serve no purpose, and it is sufficient to say that, taken together, we are of the opinion that they warranted the judgment of the trial court. There is no issue of the marriage. The plaintiff, so far as the records disclose, was patient and considerate to a high degree. The fault-findings, threatenings, and complaints of the defendant seldom brought any retort from him. * * *

The judgment of the district court is affirmed. All concur.

PART IV

LEADING ILLUSTRATIVE CASES

QUASI-CONTRACTS

CHAPTER II.

RECOVERY FOR BENEFITS TORTIOUSLY OBTAINED BY DEFENDANT—WAIVER OF TORT.

Necessity of Benefit to Defendant.

MINOR v. BALDRIDGE.

123 Cal. 187, 55 Pac. 783. 1898.

Assumpsit by Isaac Minor against Cyrus Baldridge and the California, Oregon & Idaho Railway Company. From a judgment in favor of plaintiff, defendants appeal. Reversed as to William Baldridge and affirmed as to the railroad company.

TEMPLE, J. This action is for money had and received. The only facts alleged in the complaint are that on the 2d day of November, 1895, defendants were indebted to plaintiff in the sum of \$1,000 for money had and received by them for the use of plaintiff, no part of which has been paid. The defendants did not demur, and their answer consists only of a general denial. At the trial the plaintiff introduced evidence which tended to prove that plaintiff and the corporation defendant entered into an agreement, in writing, by the terms of which plaintiff agreed to pay to the corporation \$20,000 in six installments, all dependent, as to the time of payment, upon the progress of the work in the construction of a railroad which the corporation was proposing to build. The first installment was to be paid as follows: "Five per cent. of said amount on call and after the terminal is secured on Humboldt Bay." The written contract was signed only by the plaintiff, but there was an indorsement upon it as follows: "This is secured on condition that the California, Oregon and Idaho Railway Company build up Mad river, and

take material at market price for use of construction in said railroad for all we can use. California, Oregon and Idaho Railway Co.—Cyrus Baldridge.” All this evidence was received subject to the objection on the part of defendants that it was not relevant to any issue made in the proceedings. Plaintiff owned a sawmill near Mad river, and the agreement on the part of the corporation was understood to mean that the corporation would buy lumber from plaintiff, and this, he contends, was the consideration for his contract. Some time after the contract had been signed, Baldridge, acting for the corporation, represented to plaintiff that a terminal had been secured on Humboldt Bay, and therefore the first installment was due. Baldridge also promised plaintiff that if he would make the payment the corporation would at once order from him a large amount of lumber. Believing these representations, and trusting in the promise, plaintiff paid to the Randall Banking Company at Eureka the sum of \$1,000 as and for the first installment due upon the contract. Evidence was introduced which tends to prove, and the jury found, that no terminal had been procured on Humboldt Bay, and the corporation has never purchased or offered to purchase lumber from plaintiff. The court charged the jury that, if Baldridge falsely represented that a suitable terminal had been secured on Humboldt Bay, and falsely promised that, if he paid the first installment, an order for a large amount of lumber would be immediately made, they must find for plaintiff. At the close of plaintiff’s evidence defendants, and each of them, moved for a nonsuit. The motion was denied, and the refusal was duly excepted to, and the ruling is assigned as error on the appeal.

As to Baldridge, I think the motion should have been granted. There was no evidence which even tended to prove that Baldridge ever received the money, or any portion thereof. The bank was the agent of the corporation, and it was stipulated in the written agreement that the money was to be paid to the bank for it. If the action were for damages, the rule would be different, as both principal and agent are responsible for a tort committed by an agent within his authority, and adopted by the principal. But the basis of this action is that the defendant has money which, in equity and good conscience, it ought to pay to plaintiff. There was no evidence showing or tending to show,

that Baldridge had any money which he ought to pay to plaintiff. On behalf of the corporate defendant it is contended that the evidence, all of which was received over the objections of the defendants, was inadmissible under the complaint.

(1) No evidence could be received under such complaint, because, as required in the code system of pleading, it does not state a cause of action. It does not state the real facts which constitute the cause of action, but only certain conclusions of law which might result from various actual conditions. Implications of law from various circumstances which are not stated do not constitute the facts which, under our system, must be pleaded.

(2) Admitting that the common counts can be used in code pleading, yet where the reliance, as here, is upon proof of fraudulent representations, the facts constituting the fraud should be set out with some particularity; and where that is not done no proof of fraud can be received; and,

(3) This action is based upon an alleged breach of an express contract, and the question is whether, by the terms of the contract, the money was due when it was paid. It is contended that, under such circumstances a complaint in the form of a common count for money had and received cannot be maintained.

1. That the common counts in assumpsit may be used in this state is too well established to be now called in question. The matter was discussed in *Abadie v. Carrillo*, 32 Cal. 172. Two justices expressed the opinion that the use of the common counts was inconsistent with the code provisions which require a party in his pleading to state the facts constituting his cause of action, but they were of the opinion that the practice was too well established to be then held improper. In several cases since then the use of the common counts has been upheld. In *Castagnino v. Balletta*, 82 Cal. 250, 23 Pac. 127, a discussion is had as to the circumstances which will justify its use for the recovery of money due upon express contracts; and section 1042, *Greenl. Ev.*, is cited, as applicable to our system. In *Pleasant v. Samuels*, 114 Cal. 34, 45 Pac. 998, it is said that the common count is good against a general demurrer. In *Shade v. Lumber Co.*, 115 Cal. 357, 47 Pac. 135, the same ruling is made, but it seems to be implied that such a pleading might be held insufficient as against a special demurrer that the pleading is ambiguous, uncer-

tain, and unintelligible. There was no demurrer here, and the first point must be overruled.

2. In the absence of a special demurrer, is the common count sufficient to justify the court in receiving evidence, when the objection is made that the facts constituting the alleged fraud are not set out? In answer I think it must be held, under the authorities, that such a pleading is sufficient. At common law the common count for money had and received could be used to recover money obtained by false and fraudulent representations. 1 Chit. Pl. p. 364. In *Moses v. Macferlan*, 2 Burrow, 1005, Lord Mansfield said: "One great benefit which arises to suitors from the nature of this action is that plaintiff need not state the special circumstances from which he concludes that, *ex æquo et bono*, the money received by the defendant ought to be deemed to belong to him. He may declare generally that the money was received to his use, and make out his case at the trial. This kind of action to recover back money which ought not in justice to be kept is very beneficial, and therefore much encouraged. It lies for money paid by mistake, or upon a consideration which happens to fail, or extortion, or oppression, or an undue advantage of the plaintiff's situation contrary to the laws made for the protection of persons under those circumstances." The mode of pleading is inconsistent with our Code, and it may be a matter of regret that it was ever tolerated, but the innovation is not so great if such complaint must fall before a special demurrer, which is like a motion to require a pleader to make his pleadings more definite, which practice prevails in some states.

3. The action is not based upon a breach of a contract, nor is it necessary to have a rescission of the contract to enable plaintiff to maintain his action. The theory is that the money was obtained upon a false representation that it had become due under the contract by the performance of the condition precedent by the corporation. This might all be, and the contract still remain in force. In such event the corporation may yet perform and become entitled to demand and enforce payment from plaintiff. I think the evidence was properly received, and that it was sufficient to sustain the judgment. As to the California, Oregon & Idaho Railway Company, the judgment is affirmed. As to the other defendant, the judgment is reversed.

CHAPTER IV.

RECOVERY OF MONEY PAID UNDER COMPULSION OF LAW.

Judgment Subsequently Reversed.

CLARK & CLARK v. PINNEY.

6 Cowen 297 (N. Y.). 1826.

(Assumpsit. On the trial it appeared that the defendants had obtained judgment against the plaintiffs; that execution had been issued upon this judgment and subsequently returned by the sheriff as satisfied; that afterwards the judgment was reversed by the supreme court on a writ of error. The lower court non-suited the plaintiffs.)

CURIA, per SAVAGE, C. J. The important question in this case is, whether indebitatus assumpsit for money had and received lies to recover money paid on an execution upon a judgment which was afterward reversed.

The general proposition is, that this action lies in all cases where the defendant has in his hands money which, ex æquo et bono, belongs to the plaintiff. When money is collected upon an erroneous judgment which, subsequent to the payment of the money, is reversed, the legal conclusion is irresistible, that the money belongs to the person from whom it was collected. Of course he is entitled to have it returned to him. The only question is whether this is the proper remedy.

* * * * *

Upon the whole, my view of the question is this: the general principle is, undoubtedly, in favor of sustaining the action.

* * * I am inclined to sustain the action. The inclination of the courts is to extend the action for money had and received. It is not denied that the plaintiff is entitled to some remedy for the money, though it was taken from him by process erroneous merely. Then, why turn him round from this simple action to

the antiquated remedy by *scire facias*? I do not think the purposes of justice require it.

* * * * *

In my opinion there should be a new trial.

New trial granted.

Recovery of Taxes Paid.

PRESTON v. CITY OF BOSTON.

12 Pick. 7 (Mass.).

(Assumpsit to recover \$711.50, money had and received to the use of the plaintiff, being the amount of a tax assessed upon him for the year 1828, for his poll and personal estate, and by him paid to the treasurer and collector of the city of Boston.)

* * * * *

SHAW, C. J., delivered the opinion of the court.

The only remaining question is, whether this money was paid voluntarily or under duress. A party who has paid voluntarily under a claim of right shall not afterwards recover back the money, although he protested at the time against his liability. The reason of this is obvious. The party making the demand may know the means of proving it, which he may afterwards lose; and because another course would put it in the power of the other party to choose his own time and opportunity for commencing a suit. *Brisbane v. Dacres*, 5 Taunt. 143. But it is otherwise when a party is compelled by duress of his person or goods to pay money for which he is not liable; it is not voluntary but compulsory, and he may rescue himself from such duress by payment of the money, and afterwards, on proof of the fact, recover it back. *Astley v. Reynolds*, 2 Str. 916.

What shall constitute such duress, is often made a question. Threat of a distress for rent is not such duress, because the party may replevy the goods distrained and try the question of liability at law. *Knibbs v. Hall*, 1 Esp. 84. Threat of legal process is not such duress, for the party may plead, and make proof, and show that he is not liable. *Brown v. McKinally*, 1 Esp. 279. But the warrant to a collector, under our statute for the assessment and collection of taxes, is in the nature of an execution, running against the person and property of the party,

upon which he has no day in court, no opportunity to plead and offer proof, and have a judicial decision of the question of his liability. Where, therefore, a party not liable to taxation is called on peremptorily to pay upon such a warrant, and he can save himself and his property in no other way than by paying the illegal demand, he may give notice that he so pays it by duress and not voluntarily, and by showing that he is not liable recover it back as money had and received. *Amesbury W. & C. Manuf. Co. v. Amesbury*, 17 Mass. 461.

It appears by the facts agreed that upon the first notice of the tax, the plaintiff applied to the treasurer and collector, setting forth his specific ground of objection, namely, that he was not an inhabitant and not liable to the tax on personal property. The plaintiff was informed by the collector that he had no discretion on the subject, and unless he obtained an abatement a warrant of distress would issue against him. He then applied to the city government, stated the grounds of his objection, and remonstrated against the tax; but they decided that the tax must be paid, of which the collector was duly informed. The law under which the treasurer and collector acted obliged him to issue a warrant, under which the person and property of the plaintiff would have been liable to be taken, and that officer had notified him that such warrant would be issued. Under these circumstances the money was paid, and we think it cannot be considered as a voluntary payment, but a payment made under such circumstances of constraint and compulsion, and with such notice on his part that it was so paid, that on showing that he was not liable he may recover it back in this action from the defendants, into whose treasury it has gone.

Defendants defaulted.

CHAPTER V.

RECOVERY FOR BENEFITS CONFERRED WITHOUT REQUEST.

Discharge of Defendant's Legal Obligation.

PATTERSON v. PATTERSON.

59 N. Y. 574. 1875.

(Action to foreclose a mortgage executed by defendant to secure his bond to plaintiff's testator. Defendant set up a counterclaim, one item of which was for the necessary funeral expenses of the deceased which had been paid by defendant to the undertaker. The court below found that these expenses had been paid by the defendant but held that such payment was not a proper subject of counterclaim.)

FOLGER, J. * * * I have no doubt but that the reasonable and necessary expenses of the interment of the dead body of one deceased, are a charge against his estate, though not strictly a debt due from him. The ground of this is the general right of every one to have decent burial after death; which implies the right to have his body carried, decently covered, from the place where it lies to a cemetery or other proper inclosure, and there put under ground. *Regina v. Stewart*, 12 Ad. & Ell., 773, citing *Gilbert v. Buzzard*, 2 Hagg. Consist. R. 333; see, also, *Chapple v. Coope*, 13 M. & W. 252. In the last case, in which an infant, a widow, was held liable on her contract for the funeral expenses of the burial of her deceased husband, it was said, that "there are many authorities which lay it down that decent Christian burial is a part of a man's own rights; and we think it no great extension of the rule to say, that it may be classed as a personal advantage and reasonably necessary to him." This right existing, the law casts upon some one the duty of seeing that it is accorded. 12 Ad. & Ell. supra. So it would seem, at common law, that if a poor person of no estate dies, it is the duty of him under whose roof his body lies, to

carry it, decently covered, to the place of burial. 12 Ad. & Ell., supra. The husband surviving is bound to bury the corpse of his wife; and in his absence, another, a relative, with whom she has lived up to her death, having directed the funeral and paid the expense, may recover it of the husband. *Jenkins v. Tucker*, 1 H. Bl. 90; 13 M. & W. supra; and see *Ambrose v. Kenison*, 10 C. B. 776. And where the owner of some estate dies, the duty of the burial is upon the executor. Toller Laws of Exrs., 245, bk. 3, cap. 1, § 1. And our Revised Statutes (2 R. S. 71, § 16) recognize this duty, in that the executor is prohibited from any interference with the estate until after probate, except that he may discharge the funeral expenses. From this duty springs a legal obligation, and from the obligation the law implies a promise to him who, in the absence or neglect of the executor, not officiously, but in the necessity of the case, directs a burial and incurs and pays such expense thereof as is reasonable. *Tugwell v. Heyman*, 3 Camp. 298. It is analogous to the duty and obligation of a father to furnish necessities to a child, and of a husband to a wife, from which the law implies a promise to pay him who does what the father or the husband, in that respect, omits. And so, in *Rogers v. Price*, 3 Younge & Jervis, 28, it was held that an executor, with assets, is liable to a brother of the deceased for the proper expenses of a funeral ordered and paid for by the latter in the absence of the former. In *Hapgood v. Houghton's Executor*, 10 Pick. 154, it was held that the law raises a promise on the part of the executor or administrator to pay for the funeral expenses as far as he has assets, and that if he have no assets he should plead that fact in bar, and that if he has, the judgment must be against them in his hands. And in *Adams v. Butts*, 16 Pick. 343, it was held that an account for the funeral expenses of a deceased person might be set off by the defendant in action against him by an administrator for the work and labor of the deceased in his lifetime. *Price v. Wilson*, 3 N. & M. 512, is sometimes cited as an authority that "there is no case which goes the length of deciding that if the funeral be ordered by another person, to whom credit is given, the executor is liable." *Patterson, J.*, did there use that language. But in *Green v. Salmon*, 8 Ad. & Ell. 348, he limits the expression, saying: "The judgment there probably means that the executor, where credit has been given to another person,

is not liable to the undertaker; if it lays down more, the law stated is extrajudicial." See also *Rappelyea v. Russel*, 1 Daly, 214, where the subject of the liability of a personal representative is well considered by the learned chief justice of the New York Common Pleas.

To a claim for the payment of such expenses by an executor, the objection does not lie that the rule of distribution of assets will be improperly interfered with if the claim is allowed and paid. Unless there is some objection arising out of statutory provisions, these expenses must be preferred to all other debts (*Toller on Exrs.*, 245), not excepting debts due by record, even to the sovereign. *Parker v. Lewis*, 2 Devereux [S. C.], 21. Even in the case of an insolvent estate, the executor has been allowed the reasonable expenses of the funeral of his testator, on a plea of *plene administravit*. *Edwards v. Edwards*, 2 Cr. & M. 612.

No statutory provisions are now in mind which interpose an obstacle. Though our statute of payment of debts and legacies (2 R. S., p. 87, § 27) gives the order in which the executor shall make payment of debts against the estate, and though there is no provision there for a priority of payment of funeral expenses, it is not to be held therefrom that the common-law rule is abrogated. Those expenses are not to be treated as a debt against the estate, but as a charge upon the estate, the same as the necessary expenses of administration. *Fitzhugh v. Fitzhugh*, 11 Gratt. 300. The expenses of probate of will precede the formal authority to the executor, but are allowed to him on an accounting. So should funeral expenses be. The decent burial of the dead is a matter in which the public have concern. It is against the public health if it do not take place at all (*Rex v. Stewart*, *supra*), and against a proper public sentiment, that it should not take place with decency. *Kanasan's Case*, 1 Greenl. 226; see *Jones v. Ashburnham*, 4 East, 460; *Regina v. Fox*, 2 Q. B. 246. The Revised Statutes, already cited, impliedly give discretion that the executor, even before probate, shall pay the funeral charges; and notwithstanding the statute setting out the order of payment, if he follow that direction or that authority, the amount will be allowed to him as part of the expenses of his trust, with the restriction always that the amount is no greater than is necessary. And if they are paid by another than the executor, and reimbursed by or collected of the latter, there

must be the same result. It follows that the defendant is entitled to be paid from the assets of the estate in the hands of the plaintiff, the amount which he has incurred and paid for funeral expenses.

The judgment appealed from, must be modified so as to allow to the defendant, in diminution of the amount of the claim established against him, the sum of \$184.30. He is also entitled to the interest thereon. There is no day named in the findings or in the testimony on which the sum was paid by the defendant. He alleges in his answer that the claim was assigned to him on the 25th April, 1872, and if interest is reckoned from that date, it will not be unjust to him.

The judgment so modified, should be affirmed, without costs to either party in this court.

All concur, except GROVER, J., dissenting.

Judgment accordingly.

CHAPTER VI.

RECOVERY FOR BENEFITS CONFERRED BY MISTAKE.

Mistakes of Fact and of Law Distinguished.

BILBIE v. LUMLEY.

2 East 469 (Eng.). 1802.

This was an action for money had and received, and upon other common counts, which was brought by an underwriter upon a policy of insurance, in order to recover back £100 which he had paid upon the policy as for a loss by capture to the defendants, the assured. The ground on which the action was endeavored to be sustained was, that the money was paid under a mistake, the defendants not having at the time of insurance effected, disclosed to the underwriter (the present plaintiff) a material letter which had been before received by them, relating to the time of sailing of the ship insured. It was not now denied that the letter was material to be disclosed; but what the defense rested on now and at the trial was, that before the loss on the policy was adjusted, and the money paid by the present plaintiff, all the papers had been laid before the underwriters, and amongst others the letter in question; and therefore it was contended at the trial before Rooke, J., at York, that the money having been paid with full knowledge, or with full means of knowledge of all the circumstances, could not now be recovered back again. On the other hand, it was insisted that it was sufficient to sustain the action that the money had been paid under a mistake of the law; the plaintiff not being apprised at the time of the payment that the concealment of the particular circumstance disclosed in the letter kept back, was a defense to any action which might have been brought on the policy; and the learned judge being of that opinion, the plaintiff obtained a verdict.

A rule nisi was granted in the last term for setting aside the verdict and having a new trial, which was to have been sup-

ported now by Park for the defendants, and opposed by Wood for the plaintiff. But after the report was read, and the fact clearly ascertained that the material letter in question had been submitted to the examination of the underwriters before the adjustment,—

Lord ELLENBOROUGH, C. J., asked the plaintiff's counsel whether he could state any case where, if a party paid money to another voluntarily with a full knowledge of all the facts of the case, he could recover it back again on account of his ignorance of the law? [No answer being given, his Lordship continued:] The case of *Chatfield v. Paxton* is the only one I ever heard of, where Lord Kenyon at nisi prius intimated something of that sort. But when it was afterwards brought before this Court, on a motion for a new trial, there were some other circumstances of fact relied on; and it was so doubtful at last on what precise ground the case turned, that it was not reported. Every man must be taken to be cognizant of the law; otherwise there is no saying to what extent the excuse of ignorance might not be carried. It would be urged in almost every case. In *Lowrie v. Bourdieu*, 1 Dougl. 467, money paid under a mere mistake of the law was endeavored to be recovered back; and there Buller, J., observed that *ignorantia juris non excusat*, &c.

Rule absolute.

Payor's Assumption of Risk—Compromise.

WHEADON v. OLDS.

20 Wend. 174 (N. Y.). 1838.

This was an action of assumpsit, tried at the Onondaga circuit in March, 1836, before the Hon. Daniel Moseley, one of the circuit judges.

The defendant agreed to sell to the plaintiff from 1600 to 2000 bushels of oats, at forty-nine cents per bushel. The delivery of the oats was commenced by removing them from a storehouse to a canal boat; tallies were kept, and when the tallies amounted to 500, it was proposed to guess at the remainder; and after awhile it was agreed between the parties to call the whole quantity 1900 bushels, and the plaintiff accordingly paid

for that quantity at the stipulated price. When the oats came to be measured it was ascertained that there were only 1488 bushels delivered. It was then found that the mistake had happened by both parties assuming as the basis of the negotiation fixing the quantity of 1900 bushels, that 500 bushels had been loaded in the boat at the time when they undertook to guess at the residue, whereas in fact only 250 bushels had been loaded,—the tallies representing half bushels and not bushels, and that the parties supposed that the quantity loaded was not a quarter of the whole quantity. The vendor refusing to refund a portion of the money received by him, this action was brought by the purchaser, who declared for money had and received, and delivered a bill of particulars stating the contract between the parties, that the oats were delivered, and “that in measuring said oats a mistake was made, whereby the plaintiff paid the defendant for about 300 bushels more oats than he received.” The defendant proved by one witness that the plaintiff said that he would take the oats at 1900 bushels hit or miss, and by another that he had acknowledged that he took the oats at that quantity at his own risk. He further proved that before the boat left the storehouse, on dissatisfaction being expressed by a friend of the plaintiff who was to advance the money for him, as to the mode of ascertaining the quantity, that he told them that if they were dissatisfied with the quantity, to put the oats back in the storehouse, and pay him for his trouble. When the evidence was closed the counsel for the defendant stated that he should not question the fact that the parties were mutually in error in supposing that 500 bushels of oats had been put on board, when in fact only 250 bushels had been put on board at the time of the bargain in reference to the quantity, but insisted that the bargain was obligatory upon the plaintiff, and that therefore he was not entitled to recover. He also insisted that the proof varied from the bill of particulars; and thirdly, that at all events the plaintiff was only entitled to recover for the deficiency of 250 bushels in the first estimated quantity. The judge charged the jury that if they should find that the parties at the time of the bargain in reference to the 1900 bushels were in error as to the quantity measured, and supposed that 500 bushels had been measured when in fact the quantity measured was only 250 bushels, and had based the

bargain upon that supposition, then that the plaintiff was entitled to recover for the deficiency of the 1900 bushels. The jury found a verdict for the plaintiff for \$190. The defendant moves for a new trial.

COWEN, J. The objection of variance from the bill of particulars was too general. It should have been stated whether it was in quantity, or sum, or in what else.

The mistake as proved went not only to the quantity measured, but the jury found under the charge of the judge, that relatively it influenced the entire agreement to take the oats at 1900 bushels. One ingredient of estimating the residue, as talked of, was the assuming that the supposed 500 bushels was one-fourth of the pile, which would operate unfavorably to the plaintiff, if he reasoned from the size of the smaller to that of the larger pile. Here was an admitted error, which certainly influenced the conduct of the plaintiff to the extent of 250 bushels; and, as we must take it on the finding of the jury, to the full amount which the oats came short of 1900 bushels. All the excess of payment arose from a count of half bushels as bushels. And the only question in the least open is, whether an agreement, based on that mistake, to accept the oats at the plaintiff's own risk of the quantity, shall conclude him. The mistake which entitles to this action is thus stated by the late Chief Justice Savage from the civil law: "An error of fact takes place, either when some fact which really exists is unknown, or some fact is supposed to exist which really does not exist." *Mowatt v. Wright*, 1 Wend. 360. He cites the words of 2 Ev. Poth. 437. And see 1 Dom. 248, B. 1, tit. 18, § 1, pl. 1. In judging of its legal effect, we must look "to the regard which the contractors have had to the fact which appeared to them to be true." 1 Dom. 250, B. 1, tit. 18, § 1, pl. 11. And when we see that the agreement is the result of such a regard, or, as the judge said to the jury, is based upon it, I am not aware of any case or dictum, that, because part of the agreement is to take at the party's own risk, or, as the parties expressed it here, hit or miss, it therefore forms an exception to the general rule. The agreement to risk was, pro tanto, annulled by the error. The money was paid under a contract void for so much as the oats fell short of 1900 bushels. The effect would have been different had the truth been known to

the plaintiff. See Domat, as before cited. The foundation of the arrangement to take at the plaintiff's risk was a misreckoning, one number being put instead of another, "which," says Domat (pl. 12), "is a kind of error in fact different from all other errors, in that it is always repaired."

The motion for a new trial was denied.

Mistake as to Collateral Fact.

AIKEN v. SHORT.

1 Hurlstone & Norman 210 (Eng.). 1856.

Action for money had and received. Plea, never indebted.

At the trial before Platt, B., at the Middlesex sittings, in last Hilary term, the following facts were proved: The defendant was the widow and sole executrix of Francis Short, who died in 1853. One Edwin Carter had made a will, dated February, 1846, by which he gave his property equally amongst his eight brothers and sisters, of whom George Carter was one. This will was proved after his death, which took place in 1847, by John Carter the younger. George Carter being largely indebted to Stuckey's Banking Company, by deed dated the 15th January, 1855, conveyed to the banking company his one-eighth share in the property of Edwin Carter, to which he professed to be entitled under this will, subject to the charges upon it. George Carter was at that time indebted to the defendant, as executrix of Francis Short, in the sum of £200, which was secured by an equitable mortgage of the property devised to him by Edwin Carter's will, and by the joint and several bond of George Carter, John Carter, and Charles Carter, dated October, 1850. The equitable charge was recited in the deed of the 15th January, and at the time of the execution of that deed it was agreed, as between George Carter and the bank, that the bank should pay off this sum of £200 and interest. In May, 1855, the bank made arrangements to sell the property. Before the execution of the conveyance one Richardson, acting as attorney for the defendant, applied to the bank for payment of the £200, and interest, stating that he had applied to George Carter, who had referred him to the bank. The bank accordingly, through their attorney, paid to the defendant the sum of £226 16s. 6d. The bond and instru-

ment of mortgage were handed over by the defendant to the bank, and they took a receipt for the money due on the bond and mortgage. In August, 1855, John Carter produced a will of Edwin Carter, dated April, 1846, which appeared to be the true last will of Edwin Carter. This will, the existence of which had been kept secret by the Carters, had been prepared in the office of Francis Short, the defendant's testator, and was attested by him. Under this will George Carter took only an annuity of £100, which ceased upon his making any assignment. The bank then applied to the defendant to refund the £226 16s. 6d. previously paid by them to her, and on her refusal to repay the money brought the present action to recover it back. Upon these facts, the learned judge directed a verdict for the plaintiff, reserving leave to the defendant to move to enter a verdict for him.

POLLOCK, C. B. We are all of opinion that the rule must be absolute. The case, when examined, is quite clear, and the facts lie in a narrow compass. The defendant's testator, Short, had a claim on Carter,—a bond and a security on property which Carter afterwards mortgaged to the bank. The defendant, who was the executrix of Short, applied to Carter for payment. He referred her to the bank, who, conceiving that the defendant had a good equitable charge, paid the debt, as they reasonably might do, to get rid of the charge affecting their interest. In consequence of the discovery of a later will of Edwin Carter, it turned out that the defendant had no title. The bank had paid the money in one sense without any consideration, but the defendant had a perfect right to receive the money from Carter, and the bankers paid for him. They should have taken care not to have paid over the money to get a valueless security; but the defendant has nothing to do with their mistake. Suppose it was announced that there was to be a dividend on the estate of a trader, and persons to whom he was indebted went to an office and received installments of the debts due to them, could the party paying recover back the money if it turned out that he was wrong in supposing that he had funds in hand? The money was, in fact, paid by the bank, as the agents of Carter.

PLATT, B. I am of the same opinion. The action for money had and received lies only for money which the defendant ought

to refund *ex æquo et bono*. Was there any obligation here to refund? There was a debt due to Short, secured by a bond and a supposed equitable charge by way of collateral security. The property on which Short had the charge was conveyed by Carter to the bank. Short having died, the defendant, his executrix, applied to George Carter for payment of the debt due to her husband, the testator. Carter referred her to the bank, who paid the debt, and the bond was satisfied. The money which the defendant got from her debtor was actually due to her, and there can be no obligation to refund it.

BRAMWELL, B. My brother Martin, before he left the court, desired me to say that he was of the same opinion, and so am I. In order to entitle a person to recover back money paid under a mistake of fact, the mistake must be as to a fact which, if true, would make the person paying liable to pay the money; not where, if true, it would merely make it desirable that he should pay the money. See *Wilson v. Thornbury*, L. R. 10 Ch. 239. Here, if the fact was true, the bankers were at liberty to pay or not, as they pleased. But relying on the belief that the defendant had a valid security, they, having a subsequent legal mortgage, chose to pay off the defendant's charge. It is impossible to say that this case falls within the rule. The mistake of fact was, that the bank thought they could sell the estate for a better price. It is true that if the plaintiff could recover back this money from the defendant, there would be no difficulty in the way of the defendant suing Carter. In *Pritchard v. Hitchcock*, 6 M. & G. 151, a creditor was held to be at liberty to sue upon a guarantee of bills, though the bills had been in fact paid, but the money afterwards recovered back by the assignees of the acceptor, as having been paid by way of fraudulent preference. But that does not show that the plaintiffs can maintain this action, and I am of the opinion they cannot, having voluntarily parted with their money to purchase that which the defendant had to sell, though no doubt it turned out to be different to, and of less value than, what they expected.

Rule absolute.

CHAPTER VII.

RECOVERY FOR BENEFITS CONFERRED UNDER CONTRACTUAL AGREEMENT.

Contract Void for Illegality.

WHITE v. THE FRANKLIN BANK.

22 Pick. 181 (Mass.).

WILDE, J., delivered the opinion of the Court. The first ground of the defense is, that the action was prematurely commenced. The entry in the book given to the plaintiff by the cashier of the bank, is undoubtedly good evidence of a promise to pay the amount of the deposit on the 10th day of August; and if this was a valid and legal promise, this action cannot be maintained. But it is very clear, that this promise or agreement that the deposit should remain in the bank for the time limited, is void by virtue of the Revised Stat. c. 36, § 57, which provides that no bank shall make or issue any note, bill, check, draft, acceptance, certificate or contract, in any form whatever, for the payment of money, at any future day certain, or with interest excepting for money that may be borrowed of the Commonwealth, with other exceptions not material in the present case.

The agreement that the deposit should remain until the 10th day of August amounts in law, by the obvious construction and meaning of it, to a promise to pay on that day. This therefore was an illegal contract and a direct contravention of the statute. Such a promise is void; and no court will lend its aid to enforce it. This is a well settled principle of law. It was fully discussed and considered in the case of *Wheeler v. Russell*, 17 Mass. R. 281; and the late Chief Justice, in delivering the opinion of the Court, remarked, "that no principle of law is better settled, than that no action will lie upon a contract made in violation of a statute, or of a principle of the common law." The same

principle is laid down in *Springfield Bank v. Merrick*, 14 Mass. R. 322, and in *Russell v. De Grand*, 15 Mass. R. 39. In *Belding v. Pitkin*, 2 Caines' R. 149, Thompson, J., said, "it is a first principle, and not to be touched, that a contract, in order to be binding, must be lawful." The same principle is fully established by the English authorities. In *Shiffner v. Gordon*, 12 East, 304, Lord Ellenborough laid it down as a settled rule, "that where a contract which is illegal, remains to be executed, the court will not assist either party, in an action to recover for the non-execution of it."

It is therefore very clear, we think, that no action can be maintained on the defendants' express promise, and that if the plaintiff be entitled to recover in any form of action, it must be founded on an implied promise.

The second objection, and that on which the defendants' counsel principally rely, proceeds on the admission that the contract is illegal; and they insist that where money has been paid by one of two parties to the other, on an illegal contract, both being *participes criminis*, no action can be maintained to recover it back. The rule of law is so laid down by Lord Kenyon, in *Howson v. Hancock*, 8 T. R. 577, and in other cases. This rule may be correctly stated in respect to contracts involving any moral turpitude, but when the contract is merely *malum prohibitum*, the rule must be taken with some qualifications and exceptions, without which it cannot be reconciled with many decided cases. The rule as stated by Comyns, in his treatise on contracts, will reconcile most of the cases which are apparently conflicting. "When money has been paid upon an illegal contract, it is a general rule, that if the contract be executed, and both parties are in *pari delicto*, neither of them can recover from the other the money so paid; but if the contract continues executory, and the party paying the money be desirous of rescinding it, he may do so, and recover back his deposit by action of *indebitatus assumpsit* for money had and received. And this distinction is taken in the books, namely, where the action is in affirmance of an illegal contract, the object of which is to enforce the performance of an engagement prohibited by law, clearly such an action can in no case be maintained; but where the action proceeds in disaffirmance of such a contract, and, instead of endeavoring to enforce it, presumes it to be void

and seeks to prevent the defendant from retaining the benefit which he derived from an unlawful act, there it is consonant to the spirit and policy of the law, that the plaintiff should recover." 2 Com. on Contr. 109.

The rule, with these qualifications and distinctions, is well supported by the cases collected in Comyns and by later decisions. The question then is, whether, in conformity with these principles, upon the facts agreed, this action can be maintained.

The next answer to the objection of the defendants is, that although the plaintiff may be considered as being *particeps criminis* with the defendants, they are not in *pari delicto*. It is not universally true, that a party, who pays money as the consideration of an illegal contract, cannot recover it back. Where the parties are not in *pari delicto*, the rule *potior est conditio defendentis*, is not applicable. In *Lacaussade v. White*, 7 T. R. 535, the court say, "that it was more consonant to the principles of sound policy and justice, that wherever money has been paid upon an illegal consideration it may be recovered back again by the party who has thus improperly paid it, than, by denying the remedy, to give effect to the illegal contract."

This principle, however, is not by law allowed to operate in favor of either party, where the illegality of the contract arises from any moral turpitude. In such cases the court will not undertake to ascertain the relative guilt of the parties, or afford relief to either.

But where money is paid on a contract which is merely prohibited by statute, and the receiver is the principal offender, he may be compelled to refund. This is not only consonant to the principles of sound policy and justice, but is now so settled by authority, whatever doubts may have been entertained respecting it in former times.

In the case of *Smith v. Bromley*, 2 Dougl. 696, note, it was decided, that the plaintiff was entitled to recover in an action for money had and received, for money paid by the plaintiff to the defendant for the purpose of inducing him to sign the certificate of a bankrupt, the plaintiff's sister. Lord Mansfield laid down the doctrine on this point, which has been repeatedly confirmed. "If the act is in itself immoral, or a violation of the general laws of public policy, there the party paying shall not have this action; for where both parties are equally criminal

against such general laws, the rule is *potior est conditio defendentis*. But there are other laws which are calculated for the protection of the subjects against oppression, extortion, deceit, &c. If such laws are violated, and the defendant takes advantage of the plaintiff's condition or situation, there the plaintiff shall recover." And this doctrine was afterwards adhered to and confirmed by the whole court, in the case of *Jones v. Barkley*, 2 Dougl. 684.

On this distinction it has ever since been held, that where usurious interest has been paid, the excess above the legal interest may be recovered back by the borrower in an action for money had and received. So money paid to a lottery-office-keeper as a premium for an illegal insurance, is recoverable back, in an action for money had and received. *Jaques v. Golightly*, 2 W. Bl. 1073. But in *Browning v. Morris*, Cowper, 790, it was decided, that where a lottery-office-keeper pays money in consequence of having insured the defendant's tickets, such contract being prohibited by the St. 17 Geo. 3, c. 46, he cannot recover it back, though the premium of insurance paid by the insured to the lottery-office-keeper might be. The distinction, on which this case was decided, is very material in the present case. Lord Mansfield referred to the determination in *Jaques v. Golightly*, where it was said, "that the statute is made to protect the ignorant and deluded multitude, who, in hopes of gain and prizes, and not conversant in calculations, are drawn in by the office-keepers." And he adds, "it is very material, that the statute itself, by the distinction it makes, has marked the criminal; for the penalties are all on one side; upon the office-keeper. The man who makes the contract is liable to no penalty. So in usury, there is no penalty noticed and enforced by Lord Ellenborough, in *Williams v. Hedley*, 8 East, 378. In that case it was decided, that where money was paid to a plaintiff to compromise a *qui tam* action for usury, it might be recovered back in an action for money had and received; because the prohibition and penalties of the St. 18 Eliz. c. 5, attached only on "the informer or plaintiff, or other person suing out process in the penal action, making composition, &c." It was argued for the defendant in that case, "that as the act of the defendant co-operated with that of the plaintiff in producing the mischief meant to be prevented and restrained by the statute, it was so

far illegal, on the part of the defendant himself, as to preclude him from any remedy by suit to recover back money paid by him in furtherance of that object; and that if he was not therefore to be considered as strictly in *pari delicto* with the plaintiff in the *qui tam* action, he was at any rate *particeps criminis*, and in that respect not entitled to recover from his co-delinquent, money which he had paid him in the course and prosecution of their mutual crime." This argument was overruled, and Lord Ellenborough fully approved the doctrine laid down by Lord Mansfield in *Smith v. Bromley*, and the decisions in the several cases in which that doctrine has been confirmed. The same distinction has been recognized in other cases, and was adopted by this Court in *Worcester v. Eaton*, 11 Mass. R. 376, in which Parker, C. J., after referring to the above cases, said: "This distinction seems to have been ever afterwards observed in the English courts; and being founded in sound principle, is worthy of adoption, as a principle of the common law in this country."

The principle is, in every respect, applicable to the present case, and is decisive. The prohibition is particularly levelled against the bank, and not against any person dealing with the bank. In the words of Lord Mansfield, "the statute itself, by the distinction it makes, has marked the criminal." The plaintiff is subject to no penalty, but the defendants are liable for the violation of the statute to a forfeiture of their charter. To decide, that this action cannot be maintained, would be to secure to the defendants the fruits of an illegal transaction, and would operate as a temptation to all banks to violate the statute, by taking advantage of the unwary, and of those who may have no actual knowledge of the existence of the prohibition of the statute, and who may deal with a bank without any suspicion of the illegality of the transaction on the part of the bank.

There is still another ground, on which the plaintiff's counsel rely. This action proceeds in disaffirmance of an executory illegal contract, and was commenced before the money which the defendants contracted to pay, was by the terms of the contract payable; the plaintiff therefore had a right to rescind the contract or rather to treat it as a void contract, and to recover back the consideration money.

It was so decided in *Walker v. Chapman*, Lofft, 342, where money had been paid, in order to procure a place in the customs,

but the place had not been procured; and in an action brought by the party who paid the money, it was held, that he should recover, because the contract continued executory. This case was cited with approbation by Buller, J., in *Lowry v. Bourdieu*, 2 Dougl. 470; and the distinction between contracts executed and executory, he said, was a sound one. The same distinction has been recognized in actions brought to recover back money paid on illegal wagers, where both parties were in *pari delicto*. The case of *Tappenden v. Randall*, 2 Bos. & Pul. 467, was decided on that distinction. Heath, J., said, "it seems to me, that the distinction adopted by Mr. Justice Buller between contracts executory and executed, if taken with those modifications which he would necessarily have applied to it, is a sound distinction. Undoubtedly there may be cases where the contract may be of a nature too grossly immoral for the court to enter into any discussion of it; as where one man has paid money by way of hire to another to murder a third person. But where nothing of the kind occurs, I think there ought to be *locus pœnitentiæ*, and that a party should not be compelled against his will to adhere to the contract." The same distinction is recognized in several other cases. 5 T. R. 405; 1 H. Bl. 67; 7 T. R. 535; 2 Taunt. 277; 4 Taunt. 290.

In the case of *Aubert v. Walsh*, 3 Taunt. 277, the authorities were considered, and the law was definitely settled as above stated; and it does not appear that it has ever since been doubted. In *Utica Ins. Co. v. Kip*, 8 Cowen, 20, the same principle is recognized, although the case was not expressly decided on that point. The distinction seems to be founded in wise policy, as it has a tendency in some measure to prevent the execution of unlawful contracts, and can in no case work injustice to either party.

It is, however, denied by the defendant's counsel, that the contract in question was executory, within the true intent and meaning of these decisions, and the doctrine now laid down. This question has not been much discussed, and it is not necessary to decide it in the present case, the Court being clearly of opinion, that the plaintiff is entitled to recover on the other grounds mentioned. We have considered the question as to the distinction between executory and executed contracts, because it may be of some importance that the law in that respect should

not be supposed to be doubtful in our opinion; which might be inferred, perhaps, if we should leave this question unnoticed.

The only remaining question is, whether the plaintiff was bound to make a demand on the bank before he commenced his action. The general rule is, that where money is due and payable, an action will lie without any previous demand. But where money is deposited in a bank in the usual course of business, we should certainly hold, that a previous demand would be requisite. But if money should be obtained by a bank by fraud, or, as in the present case, by means of an illegal contract, the bank claiming to hold it under such contract, there can be no good reason given why the bank should be exempted from the operation of the general rule. In *Clark v. Moody*, 17 Mass. R. 145, it was held, that if a factor should render an untrue account, claiming a greater credit than he was entitled to, the principal would have a right of action without a demand.

If the defendants had sold to the plaintiff a post-note payable at a future day, it could hardly be doubted that an action would lie to recover back the consideration money, without any previous demand; and there seems to be no substantial distinction between such a case and the one in question.

Judgment on default.

Contracts Unenforcible on Account of the Statute of Frauds— Defendant in Default.

DIX v. MARCY.

116 Mass. 416. 1875.

Contract to recover \$1800, the price of certain real estate conveyed by the plaintiff to the defendant. The answer admitted the conveyance, but averred that it was made voluntarily and without any agreement for payment on the defendant's part. Trial in the Superior Court before Dewey, J., who, after verdict for the plaintiff, reported the case to this court. The facts appear in the opinion.

ENDICOTT, J. The plaintiff conveyed his farm in August, 1872, to the defendant, his son-in-law, upon an oral agreement, that the defendant would furnish him, his wife and daughter,

with a comfortable support during their lives. The defendant also agreed to give the plaintiff a mortgage on the farm or a life lease thereof to secure the support. Under this agreement the plaintiff with his wife and daughter lived with the defendant on the farm until January, 1874. A difficulty then arose. The defendant ordered the plaintiff to leave, and refused to give him a mortgage according to the agreement. Since then the defendant has furnished no support to the plaintiff, though his wife and daughter have remained with the defendant.

The defendant denied that he made such an agreement. But the jury found that in consideration of the conveyance he agreed to give the plaintiff a mortgage or life lease to secure the support of himself and family.

By ordering the plaintiff to leave the farm and refusing to give the mortgage, the defendant rescinded his oral agreement. This agreement, being within the prohibition of the Statute of Frauds, the plaintiff could not enforce it, but brings this action to recover the value of the property conveyed. It is well settled that he may do so. Where a person pays money, renders service, or conveys property under an agreement, within the Statute of Frauds, and which the other party refuses to perform, an action will lie by such person against the party so refusing to recover the money paid, or the value of the services rendered, or property conveyed. * * *

A person who has received a benefit under such an agreement, and then repudiates it, is held to pay for that which he has received; and there is an implied assumption on which the action against him can be maintained. In such an action the plaintiff is entitled to recover what is due him, or the balance that is due him arising out of the transaction between the parties. If the suit is to recover the value of land conveyed, and there has been part performance by the party refusing to complete it, that is to be considered in determining what is due. If payments have been made, they must be deducted from the amount to be recovered for the value of the land. And if the land was not to be paid for by money, but by furnishing support and maintenance, and there has been a partial performance in that respect, the value of such partial performance to the plaintiff must be allowed by him. He is only entitled to receive from the defendant the value of the property conveyed to him.

In this case the value of the support furnished to the plaintiff by the defendant under the oral agreement, and before its rescission, was properly deducted from the value of the farm, and the plaintiff was entitled to recover the value so found. *Day v. N. Y. Cent. R. Co.*, 51 N. Y. 583; *Richards v. Allen*, 17 Me. 296; *Moses v. Macferlan*, 2 Burr. 1005.

Judgment on the verdict.

Same Subject—Plaintiff in Default.

COLLIER v. COATES.

17 Barbour 471 (N. Y.). 1854.

This was an appeal from a judgment of the Steuben County Court. The action was commenced before a justice of the peace, to recover back the sum of \$65 which had been paid by the plaintiff upon a parol contract for the sale of a farm by the defendant to the plaintiff. The complaint was for money lent, and money paid. The defendant denied the allegations in the complaint, and stated that if he had received any money from the plaintiff it was upon the condition that the defendant would enter into a written agreement with the plaintiff, at a future day, which the defendant alleged he was, and at all times had been ready to do, and he further averred that he had suffered great damage and expense by reason of the plaintiff not performing his agreement. A parol agreement between the parties, for the sale of the defendant's farm to the plaintiff, was proved, and the price was agreed upon. The plaintiff paid to the defendant \$65 upon the contract, and was to pay, within a week or ten days, enough more to make \$200; and then a written contract was to be executed by the parties. Subsequently the plaintiff came back and told the defendant he could not make out the \$200, and therefore could not take the farm, and he sent word to the defendant, by his son, that he, the defendant, might have the \$65 the plaintiff had paid him for his damages, or he might pay back some part of it if he could afford to. The jury found a verdict in favor of the plaintiff for \$65, and the justice rendered judgment for that sum, with costs. On appeal the County Court affirmed the judgment.

JOHNSON, J. I regard the rule as well settled, in this country, at least, that where a person has paid money upon a parol contract for the purchase of lands, which is void by the Statute of Frauds, he cannot maintain an action to recover back the money so paid, so long as the other party to whom the money has been paid is willing to perform on his part.

The doctrine has been twice distinctly declared in our own court, where the question was directly before it. *Abbott v. Draper*, 4 Denio, 51; *Dowdle v. Camp*, 12 Johns. 451. The same question has been decided in the same way repeatedly in several of the courts of our sister States, where the point was directly involved. *Coughlin v. Knowles*, 7 Met. 57; *Thompson v. Gould*, 20 Pick. 132, 142; *Duncan v. Baird*, 8 Dana, 101; *Lane v. Shackford*, 5 N. H. 133; *Shaw v. Shaw*, 6 Vt. 75; *Richards v. Allen*, 5 Shep. 296; *Sims v. Hutchins*, 8 S. & M. 328; *Beaman v. Buck*, 9 S. & M. 257; *McGowen v. West*, 7 Miss. 569; *Rhodes' Adm'r v. Stow*, 7 Alab. Rep. 346; *Dougherty v. Goggin*, 1 J. J. Marsh. 374; 2 J. J. Marsh. 563. In several of the cases above cited, the facts are almost identical with those of the case at bar. All the cases agree that if the party receiving the money refuses to perform the agreement, such as it is, on his part, the action lies.

I doubt whether any well-considered case can be found in the courts of this country, where the rule above laid down has been denied or even doubted. *Rice v. Peet*, 15 Johns. 503, is cited as holding a contrary doctrine, but it does not. That case turned upon the insanity of the plaintiff at the time of making the trade and turning out the note, which fact the court considered as established by the verdict of the jury. The court do indeed say that the plaintiff might have recovered upon the ground that the contract for the exchange of farms, on which the money was received, being by parol, was void. But the decision was evidently not placed upon that ground. And besides, although the defendant in that case alleged in his plea that the plaintiff had failed in performing his agreement, no evidence seems to have been given upon the subject, and there is nothing in the case to show who was, in fact, in fault in not carrying out the agreement to exchange farms. The decision upon the point presented by the finding of the jury does not impugn the principle contended for, and at most can only be regarded as a dictum the other way. But it is contended by the learned and ingenious

counsel for the plaintiff that neither *Dowdle v. Camp* nor *Abbott v. Draper* are authorities against the plaintiff's right to recover, because in each of those cases the plaintiff was in possession of the premises purchased, and might have enforced a specific performance of the agreement in a court of equity. In that respect, it is true, the two cases above cited differ from the case here, although several of the other cases cited do not. But I am unable to perceive how that circumstance affects the principle upon which the plaintiff claims the right to recover. The foundation of his claim is that the money was paid without consideration. That is, that having been paid upon a promise made by the defendant which the law would not compel him to perform, nor mulct him in damages for refusing to perform, and which was, in short, void by statute, it was paid without any consideration whatever which the law notices or regards. But this condition of the parties is not in the least altered by the purchaser's going into possession, so far as the validity and force of the agreement is concerned. It is still void by the Statute of Frauds, notwithstanding the possession. Nothing is better settled than this, that part performance of a parol contract void by statute does not take it out of the statute, or give it any validity in law as a contract.

To whatever extent either or both of the parties may have gone in the performance of such a contract, it still remains of no legal or binding force in law, in every stage up to its full and final performance and execution by both. If it is conceded that possession by the plaintiff, in addition to the payment, would have operated to defeat the recovery of the money paid, the whole ground of controversy is surrendered. It could make no difference as regards the right of action, so far as the question of consideration is concerned, whether the defendant had in fact performed in part or whether he was willing and offered to perform. Besides, when the other party is willing and offers to perform, the question as to whether the plaintiff could compel him to do so in case of his refusal, does not arise. It is clear enough that in case of a refusal the action lies, and the refusal is the ground upon which the action for the recovery is based. Certainly a willingness or an offer to perform must be regarded as placing the defendant in as favorable a situation as part performance, as regards the action at law.

Courts of equity, in decreeing the specific performance of such contracts, do not proceed upon the ground that the contract has any force or validity in law, but only that it is binding in conscience, and its performance specifically is decreed, expressly to prevent fraud, and for the very reason that in law it is of no force. What courts of equity might do, or refuse to do, can have no bearing upon the legal effect of such a contract. The last act or payment by either party, or both, short of full performance, is as much without consideration in law as the first. If the rules of equity are to be permitted to affect the legal right of recovery, the defendant may safely invoke them in his behalf in the present case. But they are not; and in determining the question here, in the action at law, they may as well be laid entirely out of view. It is by no means a universal rule that money paid, without a consideration good in law, may be recovered back. There are several exceptions to it. And I take this to be one which is well established by numerous adjudications.

The contract here upon which the money was paid, although it was so far void that the law would lend no aid in enforcing it, was not contrary to law. It was neither immoral nor illegal. It was one which the parties had a right to make and carry out. There was no fraud or mistake of facts. The money was voluntarily paid by the plaintiff, upon a promise made by the defendant, which the former knew at the time he could not oblige the latter to perform, but which promise, nevertheless, he agreed to accept as a sufficient consideration for the money parted with. The money was not received by the defendant as a loan, but as a payment. It was not received to the plaintiff's use. And as long as the defendant is willing to do what he agreed to do, in consideration of the payment, the law will not presume any promise to repay it, but will leave the parties to stand where they voluntarily placed themselves by their arrangement, until the defendant refuses to carry it out. Cases of great hardship are suggested as a reason for the adoption of the rule contended for by the plaintiff's counsel. One of which is, that otherwise the purchaser under such a contract might go on making payments until the last; and although satisfied his bargain is not an advantageous one, yet bound to make his payments or lose what he has paid, while the other party all this time is at perfect

liberty to repudiate the arrangement, and may do so at the last moment, to the serious injury of the purchaser. And it is asked if it is right to give one party such an advantage over the other? It would be easy to suggest cases of hardship on the other side, if the right to recover in any case were to be controlled by any such considerations. Take the case at bar, for an example. The evidence shows that when the plaintiff entered into the arrangement with the defendant and made the payment, the latter was engaged in putting in a crop of wheat; that the plaintiff requested the defendant to suspend operations, as he would want to put the land to some other use, and that the defendant did suspend, and waited, expecting the plaintiff to fulfil his engagement, until it was too late to put in his crop; in consequence of which he was injured to the amount of over \$100.

But suppose the whole purchase price had been paid, and the defendant, in the confident expectation of the plaintiff's acceptance of the title, had gone and purchased another farm with the money, and involved himself in liabilities which would be utterly ruinous should the other party be allowed to repudiate and recover back the money. It may be asked, would it be right to allow him to do so? It is sufficiently obvious, however, that neither the plaintiff's right to recover back the money, nor the defendant's right to retain it, can rest in, or derive any aid from, such considerations as these. The principle which governs is more fixed and stable.

It is clear that, by the rule of equity, the plaintiff could not recover until he had first made the defendant whole for the damage he had occasioned by the breach of his engagement, or offered to do so. And the law will not, I think, aid the party thus in the wrong, by presuming a promise of repayment, in his favor, until the other party shall refuse to go on and carry out the agreement upon which the money was paid.

The rule which I suppose to be established seems to me to be one founded in reason and good sense, which ought to be upheld. And I regard it as being too well settled upon authority to be departed from, except upon the most cogent reasons, and from the clearest convictions of its unsoundness. I am of opinion, therefore, that the judgment of the County Court and that of the justice should be reversed.

Contract Unenforcible on Account of Impossibility—Plaintiff's Performance Impossible—Defendant's Performance Impossible.**BUTTERFIELD v. BYRON.**

153 Mass. 517, 27 N. E. 667. 1891.

Report from Superior Court, Hampden County; James M. Barker, J.

Action by Alonzo M. Butterfield, for the benefit of the London & Lancashire Insurance Company and the Commercial Union Assurance Company, against Napoleon L. Byron, for damages for the breach of a contract for the erection of a building by defendant for plaintiff on the lands of the latter. The contract provided that the building should be completed on a certain day; that plaintiff should pay defendant a certain amount therefor, 75 per cent. of the amount of work done and materials furnished during the preceding month to be paid for on the 1st of each following month, and the remaining 25 per cent. to be paid after the entire completion of the building. Certain amounts were paid defendant, and when the building was nearly completed it was destroyed by fire. The insurance companies paid plaintiff the amount of his loss, and took an assignment of all sums then due and becoming due to him from defendant by reason of his breach of the contract. After the fire, defendant took away from the premises certain building material of the value of \$38, belonging to plaintiff.

KNOWLTON, J. It is well established law that where one contracts to furnish labor and materials, and construct a chattel, or build a house, on land of another, he will not ordinarily be excused from performance of his contract by the destruction of the chattel or building without his fault before the time fixed for the delivery of it. *Adams v. Nichols*, 19 Pick. 275; *Wells v. Calnan*, 107 Mass. 514; *Dermott v. Jones*, 2 Wall. 1; *School Dist. v. Bennett*, 27 N. J. Law, 513; *Tompkins v. Dudley*, 25 N. Y. 272. It is equally well settled that where work is to be done under a contract on a chattel or building which is not wholly the property of the contractor, or for which he is not solely accountable, as where repairs are to be made on the property of another, the agreement on both sides is upon the implied

condition that the chattel or building shall continue in existence, and the destruction of it without the fault of either of the parties will excuse performance of the contract, and leave no right of recovery of damages in favor of either against the other. *Taylor v. Caldwell*, 3 Best & S. 826; *Lord v. Wheeler*, 1 Gray, 282; *Manufacturing Co. v. Butler*, 146 Mass. 82, 15 N. E. Rep. 76; *Bank v. Beal*, 141 Mass. 566, 6 N. E. Rep. 742, and cases there cited; *Dexter v. Morton*, 47 N. Y. 62; *Walker v. Tucker*, 70 Ill. 527. In such cases, from the very nature of the agreements as applied to the subject-matter, it is manifest that, while nothing is expressly said about it, the parties contemplated the continued existence of that to which the contract relates. The implied condition is a part of the contract as if it were written into it, and by its terms the contract is not to be performed if the subject-matter of it is destroyed, without the fault of either of the parties, before the time for complete performance has arrived.

The fundamental question in the present case is, what is the true interpretation of the contract? Was the house, while in the process of erection, to be in the control and at the sole risk of the defendant, or was the plaintiff to have a like interest as the builder of a part of it? Was the defendant's undertaking to go on and build and deliver such a house as the contract called for, even if he should be obliged repeatedly to begin anew on account of the destruction again and again of a partly completed building by inevitable accident, or did his contract relate to one building only, so that it would be at an end if the building, when nearly completed, should perish without his fault? It is to be noticed that his agreement was not to build a house, furnishing all the labor and materials therefor. His contract was of a very different kind. The specifications are incorporated into it, and it appears that it was an agreement to contribute certain labor and materials towards the erection of a house on land of the plaintiff, towards the erection of which the plaintiff was to contribute other labor and materials, which contributions would together make a completed house. The grading, excavating, stone-work, brick-work, painting and plumbing were to be done by the plaintiff. Immediately before the fire, when the house was nearly completed, the defendant's contract, so far as it remained unperformed, was to finish a house on the plaintiff's

land, which had been constructed from materials and by labor furnished in part by the plaintiff and in part by himself. He was no more responsible that the house should continue in existence than the plaintiff was. Looking at the situation of the parties at that time, it was like a contract to make repairs on the house of another. His undertaking and duty to go on and finish the work was upon an implied condition that the house, the product of their joint contributions, should remain in existence. The destruction of it by fire discharged him from his contract. The fact that the house was not in existence when the contract was made is immaterial. *Howell v. Coupland*, 1 Q. B. Div. 258. It seems very clear that after the building was burned, and just before the day fixed for the completion of the contract, the defendant could not have compelled the plaintiff to do the grading, excavating, stone-work, brick-work, painting, and plumbing for another house of the same kind. The plaintiff might have answered: "I do not desire to build another house, which cannot be completed until long after the date at which I wished to use my house. My contract related to one house. Since that has been destroyed without my fault, I am under no further obligations." If the plaintiff could successfully have made this answer to a demand by the defendant that he should do his part towards the erection of a second building, then certainly the defendant can prevail on a similar answer in the present suit. In other words, looking at the contract from the plaintiff's position, it seems manifest that he did not agree to furnish the work and materials required of him by the specifications for more than one house, and, if that was destroyed by inevitable accident just before its completion, he was not bound to build another, or to do anything further under his contract. If the plaintiff was not obliged to make his contribution of work and materials towards the building of a second house, neither was the defendant. The agreement of each to complete the performance of the contract, after a building, the product of their joint contributions, had been partly erected, was on an implied condition that the building should continue in existence. Neither can recover anything of the other under the contract; for he has not performed his contract so that its stipulations can be availed of. The case of *Cook v. McCabe*, 53 Wis. 250, 10 N. W. Rep. 507, was very similar in its facts to the one at bar, and

identical with it in principle. There the court, in an elaborate opinion, after a full consideration of the authorities, held that the contractor could recover of the owner a pro rata share of the contract price for the work performed and the materials furnished before the fire. *Clark v. Franklin*, 7 Leigh, 1, is of similar purport.

What are the rights of the parties in regard to what has been done in part performance of a contract in which there is an implied condition that the subject to which the contract relates shall continue in existence, and where the contemplated work cannot be completed by reason of the destruction of the property without fault of either of the parties, is in dispute, upon the authorities. The decisions in England differ from those of Massachusetts and of most of the other States of this country. There the general rule, stated broadly, seems to be that the loss must remain where it first falls, and that neither of the parties can recover of the other for anything done under the contract. In England, on authority, and upon original grounds not very satisfactory to the judges of recent times, it is held that freight advanced for the transportation of goods subsequently lost by the perils of the sea cannot be recovered back. *Allison v. Insurance Co.*, L. R. I. App. Cas. 209, 226; *Byrne v. Schiller*, L. R. 6 Exch. 319. In the United States and in continental Europe the rule is different. *Griggs v. Austin*, 3 Pick. 20, 22; *Brown v. Harris*, 2 Gray, 359. In England it is held that one who has partly performed a contract on property of another, which is destroyed without the fault of either party, can recover nothing; and, on the other hand, that one who has advanced payments on account of labor and materials furnished under such circumstances cannot recover back the money. *Appleby v. Myers*, L. R. 2 C. P. 652; *Navigation Co. v. Rennie*, L. R. 10 C. P. 271. One who has advanced money for the instruction of his son in a trade cannot recover it back if he who received it dies without giving the instruction. *Whincup v. Hughes*, L. R. 6 C. P. 78. But where one dies, and leaves unperformed a contract which is entire, his administrator may recover any installments which were due on it before his death. *Stubbs v. Railway Co.*, L. R. 2 Exch. 311. In this country, where one is to make repairs on the house of another under a special contract, or is to furnish a part of the work and materials used in the

erection of a house, and his contract becomes impossible of performance on account of the destruction of the house, the rule is uniform, so far as the authorities have come to our attention, that he may recover for what he has done or furnished. In *Cleary v. Sohier*, 120 Mass. 210, the plaintiff made a contract to lath and plaster a certain building for 40 cents per square yard. The building was destroyed by a fire which was an unavoidable casualty. The plaintiff had lathed the building, and put on the first coat of plaster, and would have put on the second coat, according to his contract, if the building had not been burned. He sued on an implied assumpsit for work done and materials found. It was agreed that, if he was entitled to recover anything, the judgment should be for the price charged. It was held that he could recover. See, also, *Lord v. Wheeler*, 1 Gray, 282; *Wells v. Calnan*, 107 Mass. 514, 517. In *Cook v. McCabe*, *ubi supra*, the plaintiff recovered pro rata under his contract; that is, as we understand, he recovered on an implied assumpsit at the contract rate. In *Hollis v. Chapman*, 36 Tex. 1, and in *Clark v. Franklin*, 7 Leigh, 1, the recovery was a proportional part of the contract price. To the same effect are *Schwartz v. Saunders*, 48 Ill. 18; *Rawson v. Clark*, 70 Ill. 656; and *Clark v. Busse*, 82 Ill. 515. The same principle is applied to different facts in *Jones v. Judd*, 4 N. Y. 411, and in *Hargrave v. Conroy*, 19 N. J. Eq. 281. If the owner, in such a case, has paid in advance, he may recover back his money, or so much of it as was an overpayment. The principle seems to be that when, under an implied condition of the contract, the parties are to be excused from performance if a certain event happens, and by reason of the happening of the event it becomes impossible to do that which was contemplated by the contract, there is an implied assumpsit for what has properly been done by either of them, the law dealing with it as done at the request of the other, and creating a liability to pay for it its value, to be determined by the price stipulated in the contract, or in some other way if the contract price cannot be made applicable. Where there is a bilateral contract for an entire consideration moving from each party, and the contract cannot be performed, it may be held that the consideration on each side is the performance of the contract by the other, and that a failure completely to perform it is a failure of the entire

consideration, leaving each party, if there has been no breach or fault on either side, to his implied assumpsit for what he has done.

The only question that remains in the present case is one of pleading. The defendant is entitled to be compensated at the contract price for all he did before the fire. The plaintiff is to be allowed for all his payments. If the payments are to be treated merely as advancements towards a single entire consideration, namely, the completion of the whole work, the work not having been completed, they may be sued for in this action, and the defendant's only remedy is by a declaration in set-off. If, on the other hand, each installment due was a separate consideration for the payment made at the time, then, as to those installments and the payments of them, the contract is completely executed, and the plaintiff can recover nothing, and the implied assumpsit in favor of the defendant can be only for the part which remains unpaid. We are of opinion that the consideration which the defendant was to receive was an entire sum for the performance of the contract, and that the payments made were merely advances on account of it, and that, on his failure to perform the contract, there was a failure of consideration which gave the plaintiff a right to sue for money had and received, and that the like failure of consideration on the other side gave the defendant a right to sue on an implied assumpsit for work done and materials found.

The \$38 due from the defendant to the plaintiff cannot be recovered in this action. The report and the pleadings show that the suit was brought, under an assignment for the benefit of the insurers, to recover damage for a breach of the contract for the erection of the building, and not to recover the value of the shingles or weights carried away from the ruins. According to the terms of the report, the ruling being wrong, such order may be made as this court shall direct. A majority of the court are of opinion that the verdict should be set aside, and the defendant be given leave to file a declaration in set-off, if he is so advised, on such terms as the Superior Court may deem reasonable.

Verdict set aside.

PART V

LEADING ILLUSTRATIVE CASES

LANDLORD AND TENANT

CHAPTER I.

THE TENANCY.

**Whether a Tenancy at Will or From Year to Year.¹
Effect of a Parol Lease.**

TALAMO v. SPITZMILLER.

120 N. Y. 37, 23 N. E. 980. 1890.

BRADLEY, J. The action was brought to recover the proceeds of the sale made by the defendant of the plaintiff's goods. The defendant admits his liability to account to the plaintiff for the proceeds of such sale, and alleges several matters by way of counter-claim, which will be referred to so far as is essential to the determination of the questions presented for consideration on this review. The trial court found that on March 13, 1882, by an agreement of lease in writing under seal made by Catharine Dickman and defendant, she leased to him a dwelling-house for the term of five years from May 1, 1882, at the annual rent of \$450 for the first year, and \$500 for each subsequent year, payable in equal monthly installments in advance, which the defendant undertook to pay; that the defendant took such lease at the verbal instance and request of the plaintiff, and upon the unwritten understanding and agreement that they should jointly use and occupy the dwelling-house during the term mentioned in the lease, and that the plaintiff should pay to the defendant half the rent; that the defendant and the plaintiff went into the possession of the house in May, 1882, and jointly occupied it until in November following, when the plaintiff quit the house, and has not since

¹ And see *Hunter v. Frost*, 47 Minn. 1, 49 N. W. 327.

then occupied any portion of it; that the defendant has paid the monthly installments of rent as they fell due, and that the plaintiff has paid nothing to the defendant on account of the rent. The court allowed to the defendant, against the plaintiff, a sum equal to one-half the rent for the period of the joint occupancy—six and a half months. And upon the exception to the conclusion of the court that the plaintiff was entitled to recover the amount for which judgment was directed, arises the question whether the defendant was entitled to the allowance of a greater amount against the plaintiff than that given by the court on account of the rent. The contention of the defendant's counsel is: (1) That the plaintiff became liable to pay the defendant one-half the rent which the latter undertook by the lease to pay as the installments should become due; (2) that, if not so, the plaintiff became a yearly tenant, and was liable to the defendant for one-half the amount of the rent for one year. The plaintiff, not being a party to the lease, assumed no legal obligation to pay rent for the term, as a lease for more than one year, not in writing, was void. 2 Rev. St. 135, §§ 6, 8. The agreement between the parties, and under which the plaintiff entered into joint occupancy with the defendant, being void, gave to the plaintiff no right, and imposed upon the defendant no obligation, to permit him to go into or remain in possession of any portion of the house, and unless he became a yearly tenant his liability was for use and occupation for the time only which he occupied. *Thomas v. Nelson*, 69 N. Y. 118. The mere fact that a person goes into possession under a lease, void because for a longer term than one year, does not create a yearly tenancy. If he remains in possession with the consent of the landlord for more than one year, under circumstances permitting the inference of his tenancy from year to year, the latter could treat him as such, and the tenant could not relieve himself from liability for rent up to the end of the current year; and the terms of the lease, void as to duration of term, would control in respect to the rent. *Coudert v. Cohn*, 118 N. Y. —, ante, 298. The parol agreement for five years was not effectual to create a tenancy for one year. Nor did the mere fact that the plaintiff went into possession have that effect. He remained in occupation a part of one year only, and the creation of a tenancy for a year was dependent

upon something further. While it is not required that a new contract be made in express terms, there must be something from which it may be inferred—something which tends to show that it is within the intention of the parties. The payment and receipt of an installment or aliquot part of the annual rent is evidence of such understanding, and goes in support of a yearly tenancy, and, without explanation to the contrary, it is controlling evidence for that purpose. *Cox v. Bent*, 5 Bing. 185; *Bishop v. Howard*, 2 Barn. & C. 100; *Braythwayte v. Hitchcock*, 10 Mees. & W. 494; *Mann v. Lovejoy*, Ryan & M. 355; *Thomas v. Packer*, 1 Hurl. & N. 672; *Doe v. Crago*, 6 C. B. 90.

While there may appear to have been some confusion in the cases in this state upon the subject, this doctrine has been more recently recognized. *Reeder v. Sayre*, 70 N. Y. 184; *Laughran v. Smith*, 75 N. Y. 209. In the cases last cited the tenants had been in possession more than a year when the question arose, but, having gone into occupancy under an invalid lease, their yearly tenancy was held dependent upon a new contract, which might be implied from the payment and acceptance of rent, and, when once created, could be terminated by neither party, without the consent of the other, only at the end of a year. The contention, therefore, that by force of the original agreement between the parties, aided by the fact that the plaintiff went into the possession with the consent of the defendant, is not alone sufficient to support an inference of the new contract requisite to create a yearly tenancy. The plaintiff paid no rent, nor while he was in possession was any request of or promise by him made to pay any. He simply went in under the original void agreement, and left within the year. There was no evidence to require the conclusion of the trial court that the plaintiff had assumed any relation to the premises which charged him with liability, other than for use and occupation, during the time he remained in possession. The defendant's counsel, to support his proposition that the entry by the plaintiff with the consent of the defendant made him a yearly tenant, cites *Craske v. Publishing Co.*, 17 Hun 319, where it was remarked that a parol lease for a longer term than one year "operated so as to create a tenancy from year to year." If that was intended by the learned justice

as a suggestion that such a void lease operated as a demise for one year, it is not in harmony with the view of the court in *Laughran v. Smith*, *supra*. That remark in the *Craske Case* was not essential to the determination there made, as rent was in fact paid for a portion of the term; nor can it be assumed that it was intended to have the import sought to be given to it. It must be assumed, upon authority and reason, that a parol lease for more than one year is ineffectual to vest any term whatever in the lessee named, and that when he goes into possession under it, with the consent of the lessor, without any further agreement, he is a tenant at will merely, subject to liability to pay at the rate of the stipulated rent as for use and occupation. *Barlow v. Wainwright*, 22 Vt. 88. This may be converted into a yearly tenancy by a new contract, which may be implied from circumstances, when they permit it. While the mere entry with consent will not alone justify it, a promise to pay, and a purpose manifested to accept, a portion of the annual rent provided for by the agreement may, as evidence, go in support of such a new contract. There was no such evidence in this case. The promise of the plaintiff to pay one-half the rent was made preliminarily to his entry, and was part of and not distinguishable from the parol agreement with the defendant to occupy for five years, and pay one-half the rent for that term. There does not seem to have been any evidence to require the conclusion that any other than such void agreement was made between the parties, or that the plaintiff became other than a mere tenant at will of the defendant. 1 Woodf. Landl. & Ten. (1st Amer. Ed. from 13th Eng. Ed.) 221. The other cases cited by the defendant's counsel do not support the proposition asserted by him. There is no opportunity, upon the facts found, or upon any, the finding of which the evidence requires, to hold that the defendant took and held the lease as trustee for the plaintiff as to a portion of the demised premises, or that a relation was assumed by the plaintiff to the lease, between the lessor and the defendant, which legally charged him with liability to the latter for moneys paid by him pursuant to it. The parol agreement between them was void and ineffectual for any such purpose. The judgment should be affirmed.

All concur.

CHAPTER II.

THE RELATION OF LANDLORD AND TENANT.

Whether the Relation Exists.

DAVIS v. WILLIAMS.

130 Ala. 530, 30 So. 488, 54 L. R. A. 749, 89 Am. St. Reps. 55.
1900.

Appeal from chancery court, Macon county; W. L. Parks, Chancellor.

Bill by J. L. Williams and George E. Salter against Mary C. Davis and Hubert T. Davis. Decree for complainants, and defendants appeal. Reversed.

The bill was filed to compel the specific performance of a contract which was made by R. T. Davis and Mary C. Davis with the Georgia & Alabama Construction Company, by which contract R. T. Davis and Mary C. Davis, his wife, agreed, upon certain conditions, to convey to the Georgia & Alabama Construction Company one-half interest in 40 acres of land in Macon county. The conditions of this contract, as stated in the opinion, were fulfilled, and the contract was assigned by the Georgia & Alabama Construction Company to the complainants. After the execution of the contract R. T. Davis died, and the title to the lands vested in his wife, Mary C. Davis, and Hubert T. Davis and Fort Davis, his children, who survived him. Mary C. Davis purchased the interest of Fort Davis, and at the time of the filing of the present bill she and Hubert T. Davis owned the lands as tenants in common. The other facts of the case necessary to an understanding of the decision on the present appeal are sufficiently stated in the opinion. On the submission of the cause on the pleadings and proof, the chancellor rendered a decree granting the relief prayed for, and directed the defendants to execute and deliver to the complainants a deed to a one-half interest in the lands in dispute.

TYSON, J. The bill in this case was filed by complainants, as owners of a certain contract by assignment, against the respondents, as successors in interest and title to the lands agreed to be conveyed, and seeks a specific performance of that contract. The contract was executed by R. T. Davis and Mary C. Davis, his wife, in which they agreed to convey by warranty deed a half interest in 40 acres of land, to be selected by the complainants' assignors, in a certain section owned by R. T. Davis. The consideration of this contract was that the complainants' assignors were to build the Savannah, Americus & Montgomery Railroad within one-half mile of the residence of the Davises, and to erect a depot within the same distance from their residence, at any point along the line of the road most suitable to themselves. The deed was to be executed as soon as the road was built, the depot established, and a train made a trip to Montgomery. The land agreed to be conveyed upon compliance with the conditions of the contract, and selected, was a part of a tract of land owned by him, comprising about 800 acres. R. T. Davis died shortly after entering into the contract, and after the selection of the land was made by complainants' assignors under it. He left surviving him his wife and two sons. His wife, who is one of the respondents, was at the date of the filing of the bill the owner of a two-thirds undivided interest in the entire tract; and Hubert T. Davis, a son, the other respondent, was the owner of the remainder. The evidence shows without dispute that the road was built, the depot established, a train ran through to Montgomery, and the land selected during the year 1891. In other words, complainants' assignors had performed their obligation under the contract, and were entitled to a deed from the respondents during the year 1891. On April 20, 1896, the complainants by purchase became the owners of this contract, and by virtue of that ownership were entitled to a deed from the respondents.

One of the defenses invoked by the answer of the respondents is that complainant Williams for a period of about two years before the filing of this bill, at the date of its filing, and for one year subsequent thereto, tenanted and dwelt on a part of the lands in controversy. It appears from the evidence that Williams in 1892 built a house for the respondents upon

the land in controversy, which he occupied while "looking after the business" for them, until December, 1896, from which last-named date he paid rent for this house at the rate of five dollars per month for one year, and four dollars per month for eight months, ceasing to pay rent in August, 1898. The bill was filed on the 11th of February, 1897. It will be noted that when this bill was filed, and after the complainant Williams had become the owner of the contract, and after he became entitled to a deed to the lands from the respondents, he rented a part of the lands, and became the tenant of one of the respondents. His occupancy of the house which is situated upon the lands in controversy, for looking after the business of the respondents, prior to December 2, 1896, when he commenced to pay rent therefor, did not create the relation of landlord and tenant. That relation was simply that of employer and employee or master and servant, and the occupancy of the house was a part merely of the contract for service, and operated as a portion of the consideration of that agreement. *People v. Annis*, 45 Barb. 304; *Wilber v. Sisson*, 53 Barb. 258; *Haywood v. Miller*, 3 Hill 90; *Kerrains v. People*, 60 N. Y. 221, 19 Am. Rep. 158; *Doyle v. Gibbs*, 6 Lans. 180; *Bowman v. Bradley*, 151 Pa. 351, 24 Atl. 1062, 17 L. R. A. 213; *McQuade v. Emmons*, 38 N. J. Law 397; *School Dist. v. Batsche*, 106 Mich. 330, 64 N. W. 196, 29 L. R. A. 576; *East Norway Lake Church v. Froislie*, 37 Minn. 447, 35 N. W. 260; *White v. Bayley*, 10 C. B. (N. S.) 227.

The relation of landlord and tenant arose in December, 1896, which, as we have shown, was after Williams became entitled to a deed from the respondents to the land. We have the question presented as to whether Williams, being the tenant of one of the respondents at the time of the filing of the bill, and being the owner of the contract at the time he entered into that relation, can maintain the bill to require a specific performance of that contract. There is not an intimation that there was any understanding or agreement that his rental contract was subject to his right to have the contract of purchase of which he was part owner enforced, or that his landlord ever at any time in any way recognized his rights under that contract, or obligation under it to make a deed to him. It is a principle universally recognized and enforced by courts of law that a tenant is estopped to dispute the title of his landlord,

unless his landlord's title has expired or been extinguished, either by operation of law or his own act, after the creation of the tenancy. It is only when there is a change in the condition of the landlord's title for the worse after the tenant enters into his contract, in the absence of fraud or mistake of fact, that he is permitted to show the change in the condition of the title. Under no circumstances, when there is no fraud or mistake of fact, will it be permitted to deny the title of the landlord at the beginning of his term. This doctrine has been enforced by this court from its earliest history. *Randolph v. Carlton*, 8 Ala. 606; *Pope v. Harkins*, 16 Ala. 321; *Rogers v. Boynton*, 57 Ala. 501; *Farris v. Houston*, 74 Ala. 162; *Robinson v. Holt*, 90 Ala. 115, 7 South. 441; *Barlow v. Dahm*, 97 Ala. 415, 12 South. 293, 38 Am. St. Rep. 192; *Pugh v. Davis*, 103 Ala. 316, 18 South. 8, 49 Am. St. Rep. 30. In 2 *McAdam, Landl. & T.* p. 1341 et seq., this doctrine is stated in this language: "For reasons of public policy a tenant is never allowed to dispute his landlord's title after having accepted possession under him. This rule is elementary. The estoppel extends equally to landlord and tenant, so that, while the tenant is estopped from denying the landlord's title, the landlord cannot allege that he had no title at the time of the demise. Where a tenant enters into possession under a lease, he is estopped from denying the title of his landlord. The tenant must surrender the possession to the landlord before he can assail or question the title under which he entered. * * * 'He can no more show that the premises belonged to the state than he can that they belonged to himself. He must first restore the possession which he obtained from his landlord, and then, as plaintiff, he may avail himself of any title which he has been or may be able to acquire.' 'The foundation of the estoppel is the fact of the one obtaining possession and enjoying possession by the permission of the other. And so long as one has this enjoyment he is prevented by this rule of law from turning round and saying his landlord has no right or title to keep him in possession.' * * * No dispute as to the title will be tolerated until the parties are placed in their original position. * * * Nor can he be heard to deny the title of his landlord, nor can he rid himself of such relation, without a complete surrender of the possession of the land. To allow him to agree and pro-

fess to hold possession under one as landlord, and at the same time to hold covertly for himself, or for another's advantage, would be to encourage and uphold a gross fraud, which the law will never do." Continuing, the author says: "He must first surrender up the premises to his landlord before assuming an attitude of hostility to the title or claim of title of the latter."

* * * * *

No Contract to Pay Rent. Tenant's Liability for Use and Occupancy.

STORY v. McCORMICK.

70 Kan. 323, 78 Pac. 819. 1904.

Error from District Court, Geary County; O. L. Moore, Judge.

Action by Mary G. McCormick against A. M. Story, administrator. Judgment for plaintiff, and defendant brings error. Reversed.

MASON, J. In January, 1892, Mary G. McCormick, 14 years of age, lived with her mother upon a tract of ground containing 11 acres, which she owned, having inherited it from her father. In that month her mother was married to William Worrell. From the time of the marriage Worrell and his wife lived upon the land referred to, Mary McCormick living with them. This situation continued until a little after April 30, 1901, when Worrell moved from the land, Miss McCormick having written him a letter in effect asking payment of rent for the time he had occupied it. Shortly afterward he died, and, an administrator having been appointed, Miss McCormick filed a claim against the estate for rent from January, 1892. The claim was allowed by the probate court, and an appeal was taken to the district court. A jury trial resulted in a judgment for the claimant in the sum of \$638 for the use of the property from the time she attained her majority, the court by its instructions having limited the recovery to that period. From this judgment the administrator prosecutes error.

The principal question presented is whether the evidence in behalf of plaintiff was sufficient to take the case to the jury.

The facts shown, so far as necessary to the decision of this question, were substantially as follows: The land was situated about half a mile from the railroad station of Zeandale. It included alfalfa ground, pasture, orchard, and garden. The improvements included an eight-room dwelling house, a barn, and other outbuildings. The rental value was estimated by the witnesses at from \$10 to \$14 a month. Plaintiff lived with her mother and stepfather as one of the family during the period in question, except for about 18 months, during which time she was absent at school and on visits. She paid the taxes, insurance, and cost of painting and other repairs. She paid no board. She occupied exclusively one room. She and her mother did all the housework while she was at home. During several years a nephew of Worrell also formed a part of the family. At one time during plaintiff's minority two rooms were occupied by a Mr. Coons, and rent for them was paid to her guardian. Practically, but not absolutely, all the produce of the place was used there. Some of it was marketed. Upon one occasion a small amount of fruit was sold, and the money given to plaintiff. Worrell took charge of and managed the property. He supplied the table for the family, but contributed nothing to the support or to the expense of plaintiff when she was away from home. A corn crib on the place was used by him each year for storing alfalfa. Upon one occasion plaintiff wished to use it for some of her own corn, raised elsewhere, but he said that he would rather pay her \$5 than have this done, and did so, continuing to use the crib himself. The stock kept upon the place included two horses belonging to Worrell, one belonging to Mrs. Worrell, and for a part of the time one belonging to plaintiff. There was no agreement, oral or written, for the payment of rent, and had never been any talk about it. Plaintiff never made any claim for rent until the writing of the letter already mentioned. She testified, however, that she always expected to receive payment from her stepfather for the use of the property.

Plaintiff's claim for rent is not based upon the theory that there was an understanding between her and the defendant's decedent for its payment—that an implied contract existed that differed from an express contract only in that it required to be proved inferentially by circumstantial evidence instead of directly by positive testimony. She rests her claim upon a

quasi-contract, or contract implied in law, as distinguished from a contract implied in fact. Her contention is that the law imposed the obligation to pay rent, irrespective of the intentions of her stepfather in the matter. As is said in Keener on Quasi-Contracts (page 5): "The term 'contract implied in law' is used, however, to denote, not the nature of the evidence by which the claim of the plaintiff is to be established, but the source of the obligation itself. It is a term used to cover a class of obligations where the law, though the defendant did not intend to assume an obligation, imposes an obligation upon him, notwithstanding the absence of intention on his part, and in many cases in spite of his actual dissent." See, also, 15 A. & E. Encycl. of L. (2d ed.) 1078.

It is the contention of the administrator (the plaintiff in error) that the relation of landlord and tenant did not exist, either in virtue of any understanding of the parties or of an obligation imposed by law; that the evidence, showing, as it does, that the plaintiff was a member of the family that occupied the premises, is inconsistent with such a relation. Reliance is placed upon a series of Kansas cases, of which *Ayres v. Hull*, 5 Kan. 419, is the earliest. It is there said: "It may be stated, as a general principle of almost universal application, that when one person does work for another, with the knowledge and approbation of that other, the law will imply a promise on the part of the person benefited thereby to make a reasonable compensation therefor. But if the relation of the parties is such as to show some other inducement than a pecuniary one for the labor, then the law will not imply a promise to pay for such services. * * * So many considerations, other than those of a mere pecuniary character, enter into the minds of persons closely related in making up the family, that it would be both violent and dangerous to infer a promise from the kindly and sociable acts growing out of such relations. The family relations are too sacred to be invaded and disturbed by presumptions of law that are reasonable and proper when applied to the acts of strangers."

The statute (§ 3864, Gen. St. 1901) provides that "the occupant without special contract, of any lands, shall be liable for the rent to any person entitled thereto." The evidence is capable of an interpretation showing such an occupancy of plain-

tiff's land by defendant's decedent as to cause him to be liable to her for rent under the terms of this statute, unless "the relation of the parties is such as to show some other inducement than a pecuniary one" for plaintiff's permitting its use. Whether such an inducement is shown in this case is a question of fact. Some portions of the testimony tend strongly to suggest a purely domestic arrangement between the parties, in disregard of all business considerations. Other portions have a somewhat contrary tendency. Considered as a whole, we do not think it necessarily negatives the idea of a legal obligation on the part of the defendant to pay rent. The situation is readily to be distinguished from that arising where, after some family disagreement, by an obvious afterthought a member on the one hand seeks to enforce a charge for his services, or on the other is sought to be held liable for the payment of board. There the usual and natural motives of mutual helpfulness sufficiently account for the services rendered and benefits received. But it is neither usual nor natural that a young girl should, without expectation of compensation, furnish to her stepfather, in addition to her own labor, a place of residence, with farm land, orchard, and garden, that would go far toward affording support for his entire family, she herself continuing to bear the whole burden of taxes, insurance, and repairs. If the tract had been still larger, and had yielded considerable produce for sale, and the stepfather had received the income derived from that source, it would hardly be contended that he should not be held for rent, whatever use he might have made of the money. Yet the difference between such a state of facts and that here presented is one of degree rather than of kind. The question whether, under all the circumstances, a tenancy existed, was rightfully submitted to the jury.

Plaintiff in error cites, as a case in point, *Collyer v. Collyer*, 113 N. Y. 442, 21 N. E. 114, where a judgment upon an implied contract for rent was reversed. That the facts were not closely similar to those of the case at bar appears from this language of the opinion: "The plaintiff gave proof showing beyond all question that she (defendant) did not suspect that she was there as his tenant, under obligation to pay rent, and the circumstances were such that he must have known how she understood it." An Indiana case—*Tinder v. Davis*, 88 Ind. 99—is cited as bear-

ing upon the interpretation of the statute above quoted, which was adopted from that state. But the point decided is merely that the statute does not operate to establish a contractual relation between the owner of land who has leased it by express contract to a tenant, and a member of the family of such tenant. In 1 Taylor's Landlord and Tenant, § 25, it is said: "Nor will the relation of landlord and tenant be inferred from occupation if the relative position of the parties to each other can, under the circumstances of the case, be referred to any other distinct cause." See, also, *Hardin v. Pulley*, 79 Ala. 381; *Curtis v. Hollenbeck*, 92 Ill. App. 34. But in the present case the question whether the occupancy of the property is capable of being sufficiently accounted for by the relation of the parties is one of fact to be determined by the jury, depending upon the reasonableness of the supposition, under all the circumstances disclosed by the evidence, that plaintiff intended gratuitously to contribute its use to the support of the family. *Chamberlin v. Donahue*, 44 Vt. 57, well illustrates the principle that, in spite of strong evidence against tenancy, the ultimate decision of the question is for the jury. In *Knox v. Singmaster*, 75 Iowa, 64, 39 N. W. 183, a minor daughter was permitted to maintain an action against her father for the use of a farm which he occupied without any agreement as to rents, during a time while she lived with him upon it, but the questions here involved were not discussed. We think the conclusion we have announced is not out of harmony with the authorities.

It is also assigned as error that the trial court permitted the plaintiff to testify that it was always her intention to make some charge and to receive some rent for the property. Her intention was a material matter in the inquiry. If she had never had any intention of exacting or expectation of receiving rent, she could not have recovered. The objections made to her testimony in this regard run rather to its credibility than to its competency, and no sufficient ground is shown for its rejection. The instructions given are complained of, but upon the same general grounds upon which it is urged that the demurrer to the evidence should have been sustained. The court instructed, in substance, that the plaintiff, in order to recover, must show that Worrell occupied the premises with the consent of plaintiff, that there was no agreement as to whether rent should be paid or

not, that plaintiff expected to receive rent, and that, in view of the conduct and relations of the parties and the circumstances proved upon the trial, Worrell did not have good reason to believe that he was not to pay rent. In this no error is perceived. * * *

CUNNINGHAM, GREENE, and ATKINSON, JJ., concurring.

JOHNSTON, C. J. I concur in the reversal of the judgment, but dissent from the view that a liability for rent was shown, and also that mere occupation of premises implies a promise to pay rent. The plaintiff, her mother and stepfather constituted a family, and together occupied the premises. There was no agreement that rent should be paid, and none was ever claimed or demanded until the family relation was ended. There is no liability to pay rent unless the relation of landlord and tenant existed. It did not exist unless it was based upon a mutual intention to form that relation, and there must have been an agreement, either express or implied. It will never be implied where the conduct and relations are inconsistent with its existence. Where the family relation exists, as it did here, it is well settled in Kansas that one member of a family has no right of action against another for wages on one side, nor on the other side for board or lodging. Neither is there a right of action for anything furnished by one to the other as a member of the family, unless there is an express contract that such payment is to be made. *Ayers v. Hull*, 5 Kan. 419; *Greenwell v. Greenwell*, 28 Kan. 675; *Ensey v. Hines*, 30 Kan. 704, 2 Pac. 861; *Shane v. Smith*, 37 Kan. 56, 14 Pac. 477; *Wyley v. Bull*, 41 Kan. 206, 20 Pac. 855; *Collyer v. Collyer*, 113 N. Y. 442, 21 N. E. 114; *Tinder v. Davis*, 88 Ind. 99; *Gorrell v. Taylor* (Tenn.) 64 S. W. 888; *Fleming v. Hughes* (Miss.) 6 South. 842; 1 *Beach on Contracts*, 775. Within the rule of these cases, no liability for rent was shown, and the jury should have been so advised.

SMITH, J., concurring with views expressed by JOHNSTON, C. J. BURCH, J., not sitting, having been of counsel in the subject-matter of the action.

CHAPTER III.

LEASES.

What Constitutes a Lease. Contract in Writing.

BAER v. MINOCK.

128 Mich. 676, 87 N. W. 1045. 1901.

Action by John D. Baer against John K. Minock. From a judgment in favor of defendant, plaintiff brings error. Reversed.

MOORE, J. The plaintiff advertised his store building in Detroit for rent. The defendant replied thereto by letter. As a result, Mr. Minock came to Detroit, looked over the premises, and with Mr. Baer drove around the vicinity of the store, and after some conversation, according to the claim of the plaintiff, offered him \$10 "for the rent of the building at twenty-five dollars a month for the first six months, payable in advance," providing that plaintiff build a barn on the premises for use in the hay and feed business, which Mr. Minock contemplated conducting in connection with a meat and grocery store, which offer was accepted by Mr. Baer, who sent Mr. Minock a letter the following day (April 21, 1900) stating the terms of the agreement in accordance with their conversation, in which it was stated, "Herewith please find receipt for advance rent on room 686 Third Ave., beginning May 1st, 1900; rent \$25 per month, first six months." It also contained information concerning the building of the barn. Mr. Minock replied thereto by letter dated April 24, 1900, in which it was stated: "All right. I am loading two cars with hay and produce, and will be in Detroit as quick as I can." Mr. Minock went into possession, and paid \$25 in advance for the rent of the building, and before June 1st vacated the store, and left the keys at the baker's shop, next door. Mr. Baer did not accept the surrender of the premises, but demanded the rent of Mr. Minock

for each month as it accrued. He refused payment, and Mr. Baer commenced suit in justice's court July 11, 1900, to recover the accrued rent. The case was appealed to the circuit court, where a jury rendered a verdict in favor of defendant. Plaintiff brings error.

We do not deem it necessary to discuss all the assignments of error, as a disposition of one of them disposes of the case. The court was asked to charge the jury that the contract was in writing, but declined to do so. He said to the jury: "About the only thing for you to decide in this case is what the contract between the parties respecting the leasing of the premises on Third avenue was. You have heard the testimony in this case, and it appears from the testimony of both that they met here in the city of Detroit, and that Mr. Minoek and Mr. Baer went up to the premises and drove around the surrounding streets, or the streets in the immediate vicinity; that when they parted Mr. Minoek at that time paid him ten dollars upon the lease of the premises. Their stories did not agree as to what the lease was. Mr. Baer tells you it was a lease for six months; Mr. Minoek tells you it was simply a lease from month to month; and it is for you, I think, to decide which is correct. Now, after they separated, Mr. Baer wrote this letter, which I will read as far as is essential, though I shall not read the entire letter: 'Detroit, Mich., April 21, 1900. J. K. Minoek, Esq.—Dear Sir: Herewith please find receipt for advance rent on room No. 686 Third avenue, beginning May 1st, 1900; rent \$25 per month, first six months.' On the 24th of April Mr. Minoek answered the letter as follows: 'Dear Sir: I received your letter. All is right. I am loading two cars with hay and produce, and will be at Detroit as quick as I can.' Now, these letters, together with the conversation they had, I think, constitute all the evidence from which you are to deduce the terms of the contract between them. You may consider these letters as bearing upon the question. If it were not for the fact that I believe 'rent \$25 per month, first six months,' is ambiguous, I think it would be doubtless true that the contract would exist in writing; but I am not prepared to say to you that 'rent \$25, first six months,' relates to the term for which the premises were leased. You may find that it does so relate to the term, and you may find from the oral contract, from the testimony

of Mr. Baer, and from this letter and the answer, 'All is right,' that it was for six months; but I do not think that the phrase 'rent \$25 per month, first six months,' necessarily refers to the term. It may be expressive of the rent alone; that is to say, you may find that the rent was payable at \$25 per month, and was to continue for six months if he stayed that length of time.' We cannot agree with the learned circuit judge that there is anything ambiguous about this correspondence. The defendant says he does not remember getting the letter of April 21st, but does not deny getting it, and clearly the letter of April 24th is in answer to it. The construction of the contract was for the court, and not for the jury. *Battershall v. Stephens*, 34 Mich. 68; *Wagner v. Egleston*, 49 Mich. 218, 13 N. W. 522; *Brown v. Schiappacasse*, 115 Mich. 47, 72 N. W. 1096; *Ranney v. Higby*, 5 Wis. 62; *Scanlan v. Hodges*, 3 C. C. A. 113, 52 Fed. 354. Under the proofs the plaintiff was entitled to an instruction to the jury that he was entitled to recover two months' rent. *Scott v. Beecher*, 91 Mich. 594, 52 N. W. 20.

Judgment is reversed, and new trial ordered.

GRANT, J., did not sit. The other justices concurred.

Oral Agreement. Statute of Frauds. Action for Rent.

MATTHEWS v. CARLTON.

189 Mass. 285, 75 N. E. 637. 1905.

Appeal from Superior Court, Worcester County.

Action of contract by Robert F. Matthews against Herbert E. Carlton. Judgment was rendered for defendant upon agreed facts, and plaintiff appealed. Affirmed.

KNOWLTON, C. J. This case comes before us on an agreed statement of facts, by which it appears that, in the early part of June, 1904, the defendant "orally agreed to hire a tenement of the plaintiff * * * at \$25 per month, beginning on the 1st day of July, 1904." The tenement was then occupied by a tenant, who was to hold it until July 1, 1904, and who paid the plaintiff his rent up to that date. With the consent of this tenant, who was then occupying the tenement, the defendant

moved a part of his goods into the tenement. The tenant afterwards moved out, and the defendant moved other goods in, but subsequently, before the 1st day of July, moved all the goods out and notified the plaintiff that he should not take the tenement. The question is whether the defendant is liable to the plaintiff for rent for the month of July. His moving a part of his goods into the house in June, with the consent of the tenant then in possession, and his subsequent removal of them before the expiration of the term of the tenant, does not affect his rights. He was not in possession under his contract with the plaintiff, and he never became a tenant of the plaintiff. He never entered under his agreement, but, on the contrary, before the time when his term was to begin he gave the plaintiff notice that he should not enter.

By Rev. Laws, c. 127, § 3, it is provided that an estate or interest in land, created without an instrument in writing signed by the grantor or his attorney, shall have the force and effect of an estate at will only, and that "no estate or interest in land shall be assigned, granted, or surrendered, unless by such writing or by operation of law." The oral agreement, therefore, gave the defendant no estate or interest in the land, and under this section, as well as under Rev. Laws, c. 74, § 1, cl. 4, no action could be maintained for the enforcement of it.

The plaintiff's declaration contains two counts—one for so-called rent or for use and occupation, and the other for damages for a breach of the oral agreement. The first count cannot be maintained, because the relation of landlord and tenant never existed between the parties. The defendant declined to become the plaintiff's tenant before the time fixed for the beginning of the term. There can be no liability of this kind without an occupation by a tenant, actual or constructive, as well as a contract, express or implied. *Rogers v. Coy*, 164 Mass. 391, 41 N. E. 652; *Bacon v. Parker*, 137 Mass. 309-312; *Central Mills v. Hart*, 124 Mass. 123; *Leonard v. Kingman*, 136 Mass. 123; *Merrill, Adm. v. Bullock*, 105 Mass. 486; *Eastman v. Anderson*, 119 Mass. 526-531; *Larkin v. Avery*, 23 Conn. 304. The second count is upon an agreement which is within the Statute of Frauds. Rev. Laws, c. 74, § 1, cl. 4; *White v. Wieland*, 109 Mass. 291; *Parker v. Tainter*, 123 Mass. 185.

Judgment for the defendant.

CHAPTER IV.

CONDITIONS, RESERVATIONS AND EXCEPTIONS.

Conditions Precedent Distinguished from Conditions Subsequent.

FRANK v. STRATFORD-HANDCOCK.

13 Wyo. 37, 77 Pac. 134, 67 L. R. A. 571, 110 Am. St. Rep. 963. 1904.

POTTER, J. * * * Conditions precedent are to be strictly complied with. Such a condition is one that must happen or be performed before the estate dependent upon it can arise or be enlarged, while a condition subsequent defeats the estate in case it does not happen or is not performed. In determining whether a particular provision amounts to a condition or not, the rule is that the intention of the grantor governs. Such intention is to be gathered from the whole instrument and the existing facts. The authorities lay down the principle that whether a condition is precedent or subsequent depends upon the intent of the parties, as collected from the whole contract, whatever the order in which they are found, or the manner in which they are expressed, although certain words are customary when a condition rather than a covenant is intended. But it seems that the same words may be employed to create either a covenant or a condition. The words employed in the beginning of the instrument are words of present demise. It reads: "This article of agreement, made and entered into this 4th day of April, 1901, by and between Abe Frank, party of the first part, and S. Henrietta Carlile-Kent, party of the second part, witnesseth: That the party of the first part has this day leased to the party of the second part the following described lands [description] for a term of six months from April 1, 1901, and the party of the second part agrees to pay as rental of said premises the taxes on the same for the current year 1901." Then follows the clause giving the privilege of purchase, and

following that are the other agreements as to the use of the premises, and the instrument then concludes with the agreement for the deposit that is quoted in an earlier part of this opinion.

The deposit was required for a specified purpose, viz., to secure the faithful performance by plaintiff, the lessee, of the lease, and the payment of the taxes. She had agreed to keep the fences and buildings in repair, to refrain from pasturing stock upon certain designated lands, and to limit her use of the premises in other respects; and the only rental was to be taxes for the year, and a certain portion of the crops, should she not exercise the option of purchase. Now, we know, as the parties doubtless also knew, that the taxes would not become due or payable until a very short time before the expiration of the lease. The statutes require the tax list to go into the hands of the collector by the third Monday of September, and the taxes would not become delinquent until the last day of December. Indeed, the amount of the taxes could not have been ascertained until September. Here, then, is to be perceived a substantial reason for the requirement of security in advance. A reason is also to be found in the nature of the covenants of the plaintiff respecting the use to be made of certain parts of the premises, as well as to the keeping of the improvements in repair. This would all indicate that the agreement for the security was intended as a condition, rather than a mere covenant. Moreover, as a covenant, it would have added nothing substantially to the contract. The damages that might be recovered upon its breach could not have exceeded the damages sustained by a breach of the covenants which it was intended to secure; and those damages would be as capable of recovery by assigning and proving a breach of the principal covenants. The very nature of the provision would seem to stamp it as a condition precedent. There would be little necessity for requiring security by a deposit of money after the time for performance of the lease had expired, and the lessee had enjoyed on her part all its benefit. As no time for making the deposit was stated, doubtless a reasonable time would be implied, and, had the lessee been out of possession, a tender of the security and demand for possession within a reasonable time might no doubt have entitled her to possession under the lease. But no such question arises here. It was clearly proven, and so found by the court, that she was in

possession at and prior to the making of the contract. There is nothing in the evidence to show that Frank did any act toward placing her in possession; nor is the title or right under which she had been in possession disclosed, except, perhaps, it may be inferred from a circumstance to which we shall have occasion to refer. There is no question of waiver of the condition which we are permitted to consider. The pleadings set out a full compliance with all conditions; and the judgment of the court was based upon a finding that they had been substantially complied with. * * *

CHAPTER V.

COVENANTS.

No Implied Covenant That an Unfurnished Dwelling Is Fit for Habitation.

DALY v. WISE.

132 N. Y. 306, 30 N. E. 837. 1892.

Appeal from common pleas of New York city and county, general term.

Action by Maria L. Daly against John S. Wise to recover rent. Plaintiff obtained judgment, which was affirmed by the general term. Defendant appeals. Affirmed.

The other facts fully appear in the following statement by FOLLETT, C. J.:

September 27, 1888, the litigants entered into a written lease by which the plaintiff let to the defendant an unfurnished dwelling, known as "334 West Fifty-Eighth Street," in the city of New York, for one year from October 15, 1888, for \$1,800, payable \$150 October 15, 1888, and a like sum on the 15th day of each succeeding month. The lease contained no covenant in respect to the then condition of the house, nor that the lessor should put or keep it in repair. November 15, 1888, the defendant began to occupy the premises, paid the rent for four months, until January 15, 1889, and continued in occupation until February 2, 1889, when he abandoned them because of their unsanitary condition, arising from defective plumbing. February 4, 1890, this action was begun to recover the sums due by the terms of the lease on the 15th day of February, March, April, and May, 1889, \$600 in all, with interest. The defendant answered that he was induced to enter into the lease by the oral representation of the plaintiff's agent "that the building on said premises was properly constructed and in thorough repair, the more especially in the matter of plumbing and sanitary arrangements; and that this defendant signed

said lease, relying upon the faith of said representation so made as aforesaid." It was also alleged: "That, when defendant entered into possession of said premises, it was discovered that said representations were untrue, and that said premises were unfit for the purposes of a residence, in that there existed hidden defects in the plumbing and construction of the sewer and other pipes, and the sanitarian arrangements in the buildings thereon. That such defects were concealed from view, and were not discovered until the effect thereof became apparent in the health of the defendant's family. That by reason of said defects the said building became charged with sewer gas and other foul and poisonous odors, thereby causing the defendant, his wife, children, and servants, to become sick, and in great danger of death; and they so continued sick and in danger until the defendant was evicted from said premises, as hereinafter set out." At the close of the evidence, neither party asked to have any question of fact submitted to the jury, but each moved that a verdict be directed in his or her favor. The defendant's motion was refused, and he excepted; but the plaintiff's motion was granted, and the defendant again excepted. No other exceptions are contained in the record, and the only questions reviewable in this court are those presented by the two exceptions mentioned. A judgment was entered on the verdict for the plaintiff, which was affirmed at general term. No opinion was written, but the case was decided upon the opinion of the same court in another action, arising over the same lease. 7. N. Y. Supp. 902.

FOLLETT, C. J. (after stating the facts.) In case neither party requests to have any question of fact submitted to the jury, but each asks that a verdict be directed in his favor, the court is authorized to determine the fact in issue; and upon appeal the disputed facts are deemed to have been determined in favor of the party for whom the verdict is directed. *Kirtz v. Peck*, 113 N. Y. 222, 21 N. E. Rep. 130; *Dillon v. Cockroft*, 90 N. Y. 649; *Provost v. McEnroe*, 102 N. Y. 650, 5 N. E. Rep. 795. This case must be determined upon the theory that all the disputed facts have been found in favor of the plaintiff.

In case the whole of an unfurnished dwelling is leased for a definite term, under a single contract, which contains no cove-

nant that the premises are in good repair, or that the lessor will put or keep them so, the law does not imply a covenant on the part of the lessor that the dwelling is without inherent defects, rendering it unfit for a residence. *Franklin v. Brown*, 118 N. Y. 110, 23 N. E. Rep. 126. In *Smith v. Marrable*, 11 Mees. & W. 5, a contrary rule was laid down by Baron Parke. That case arose out of a contract to let a furnished dwelling for six weeks at eight guineas per week. The tenant moved in, but found the house so infested with bugs that it was uninhabitable, and at the end of the first week left, paying the rent for that week. In an action brought, it was held, in the opinion delivered by Baron Parke, concurred in by Barons Alderson and Gurney, "that if the demised premises are incumbered with a nuisance of so serious a nature that no person can reasonably be expected to live in them the tenant is at liberty to throw them up. This is not the case of a contract on the part of the landlord that the premises were free from this nuisance. It rather rests in an implied condition of law, that he undertakes to let them in a habitable state." Chief Baron Abinger concurred upon the ground that "a man who lets a ready-furnished house surely does so under the implied condition or obligation—call it which you will—that the house is in a fit state to be inhabited." The opinion of Baron Parke was rested on the authority of *Edwards v. Etherington*, Ryan & M., 268, 7 Dowl. & R. 117, and *Collins v. Barrow*, 1 Moody & R. 112, both of which cases, together with *Salisbury v. Marshal*, 4 Car. & P. 65, are expressly overruled by *Hart v. Windsor*, 12 Mees. & W. 68, in which Parke, B., said: "We are under no necessity of deciding in the present case whether that of *Smith v. Marrable* be law or not. It is distinguishable from the present case on the ground on which it was put by Lord Abinger, both on the argument of the case itself, but more fully in that of *Sutton v. Temple*, 12 Mees. & W. 52, for it was the case of a demise of a ready-furnished house for a temporary residence at a watering place. It was not a lease of real estate, merely. But that case certainly cannot be supported on the ground on which I rested my judgment." *Smith v. Marrable* was decided at Hilary term, 1843, and *Hart v. Windsor* and *Sutton v. Temple* at Michaelmas term of the same year. The rule laid down in *Smith v. Marrable* by Abinger, C. B., as applicable to furnished houses, has been fol-

lowed in *Campbell v. Lord Wenlock*, 4 Fost. & F. 716, and *Wilson v. Hatton*, 2 Exch. Div. 336, but the rule as stated by Parke, B., has not been followed in England or in this state. *Franklin v. Brown*, 118 N. Y. 110, 23 N. E. Rep. 126. The defendant cannot escape liability for rent on the ground that the law implied a covenant that the dwelling was fit for habitation.

Is the evidence contained in the record sufficient to have required the trial court to have held, as a matter of law, that the plaintiff fraudulently represented that the dwelling and its fixtures were in good condition, or that she fraudulently concealed from the plaintiff the fact that it was in an unsanitary condition? In case the owner of a dwelling knows that it has secret defects and conditions rendering it unfit for a residence, and fraudulently represents to one who becomes a tenant that the defects and conditions do not exist, or if he fraudulently conceals their existence from him, the lessee, if he abandons the house for such cause, will not be liable for subsequently accruing rent. *Wallace v. Lent*, 1 Daly, 481; *Jackson v. Odell*, 12 Daly, 345; *Rhineland v. Seaman*, 13 Abb. N. C. 455; *Cesar v. Karutz*, 60 N. Y. 229. In the case at bar the defendant testified, and in this he was not contradicted, that, when he first went to the house with the plaintiff's agent, he said: "I complained to him [the agent] at the time that I thought some of the plumbing looked old. He said that Mrs. Daly was very stiff,—determined not to put in any new; that it was all in good condition; that they had fixed it as they thought it ought to be." This is the only representation which was made by the plaintiff or her agent in respect to the sanitary condition of the dwelling. It was not shown that the plaintiff or the agent knew that the representations were false, or that the plumbing was out of order, and fraudulently concealed the fact. This takes the case out of the rule above referred to, in respect to the owner's liability in case he fraudulently misrepresents the condition of the dwelling, or, knowing that it is in bad condition, fraudulently conceals the fact from the person who becomes the lessee. Is the plaintiff liable for having stated that a material fact existed which did not exist, i. e., that the plumbing was in good order, upon the theory that she was bound to know whether or not the statement was true? In case a party, for the purpose of inducing another to contract with him, states,

on his personal knowledge, that a material fact does or does not exist, without having knowledge whether the statement is true or false, and without having reasonable grounds to believe it to be true, he is liable in fraud, if the statement is relied on, and is subsequently found to be false, although he had no actual knowledge of the untruth of the statement. *Bennett v. Judson*, 21 N. Y. 238; *Marsh v. Falker*, 40 N. Y. 562; *Oberlander v. Speiss*, 45 N. Y. 175; *Wakeman v. Dalley*, 51 N. Y. 27; 2 Pom. Eq. Jur. §§ 887, 888; *Story*, Eq. Jur. § 193. It does not appear that the plumbing had not been fixed as stated, nor that the statement that "it was all in good condition" was made without actual or supposed knowledge of its condition, nor that it was made in bad faith; and we think the case does not fall within the principle of the authorities last cited. The defendant cannot escape liability on the ground that the statement of the agent amounted to a warranty, because it is not so pleaded in the answer. The judgment should be affirmed, with costs.

All concur.

Lease of Furnished Rooms. Implied Covenant That They Are Fit for Immediate Habitation.

INGALLS v. HOBBS.

156 Mass. 348, 31 N. E. 286. 1892.

Appeal from superior court, Suffolk county.

Action by Sarah P. Ingalls and others against Warren D. Hobbs to recover rent for a dwelling house. Defendant had judgment on an agreed statement of facts, and plaintiffs appeal. Affirmed.

KNOWLTON, J. This is an action to recover \$500 for the use and occupation of a furnished dwelling house at Swampscott during the summer of 1890. It was submitted to the superior court on what is entitled an "agreed statement of evidence," by which it appears that the defendant hired the premises of the plaintiffs for the season, as a furnished house, provided with beds, mattresses, matting, curtains, chairs, tables, kitchen utensils, and other articles which were apparently in

good condition, and that when the defendant took possession it was found to be more or less infested with bugs, so that the defendant contended that it was unfit for habitation, and for that reason gave it up, and declined to occupy it. The agreed statement concludes as follows: "If, under the above circumstances, said house was not fit for occupation as a furnished house, and, being let as such, there was an implied agreement or warranty that the said house and furniture therein should be fit for use and occupation, judgment is to be for the defendant, with costs. If, however, under said circumstances, said house was fit for occupation as a furnished house, or there was no such implied agreement or warranty, judgment is to be for the plaintiffs in the sum of \$500, with interest from the date of the writ, and costs."

Judgment was ordered for the defendant, and the plaintiffs appealed to this court.

The agreement of record shows that the facts were to be treated by the superior court as evidence from which inferences of fact might be drawn. The only "matter of law apparent on the record" which can be considered as an appeal in a case of this kind is the question whether the judgment is warranted by the evidence. Pub. St. c. 152, § 10; *Rand. v. Hanson*, 154 Mass. 87, 28 N. E. Rep. 6; *Mayhew v. Durfee*, 138 Mass. 584; *Railroad Co. v. Wilder*, 137 Mass. 536; *Hecht v. Batcheller*, 147 Mass. 335, 17 N. E. Rep. 651; *Fitzsimmons v. Carroll*, 128 Mass. 401; *Charlton v. Donnell*, 100 Mass. 229. The facts agreed warrant a finding that the house was unfit for habitation when it was hired, and we are therefore brought directly to the question whether there was an implied agreement on the part of the plaintiff that it was in a proper condition for immediate use as a dwelling house. It is well settled, both in this commonwealth and in England, that one who lets an unfurnished building to be occupied as a dwelling house does not impliedly agree that it is fit for habitation.

Dutton v. Gerrish, 9 Cush. 89; *Foster v. Peyser*, Id. 242; *Stevens v. Pierce*, 151 Mass. 207, 23 N. E. Rep. 1006; *Sutton v. Temple*, 12 Mees. & W. 52; *Hart v. Windsor*, Id. 68. In the absence of fraud or a covenant, the purchaser of real estate, or the hirer of it for a term, however short, takes it as it is, and determines

for himself whether it will serve the purpose for which he wants it. He may, and often does, contemplate making extensive repairs upon it to adapt it to his wants. But there are good reasons why a different rule should apply to one who hires a furnished room, or a furnished house, for a few days, or a few weeks or months. Its fitness for immediate use of a particular kind, as indicated by its appointments, is a far more important element entering into the contract than when there is a mere lease of real estate. One who lets for a short term a house provided with all furnishings and appointments for immediate residence may be supposed to contract in reference to a well-understood purpose of the hirer to use it as a habitation. An important part of what the hirer pays for is the opportunity to enjoy it without delay, and without the expense of preparing it for use.

It is very difficult, and often impossible, for one to determine on inspection whether the house and its appointments are fit for the use for which they are immediately wanted, and the doctrine *caveat emptor*, which is ordinarily applicable to a lessee of real estate, would often work injustice if applied to cases of this kind. It would be unreasonable to hold, under such circumstances, that the landlord does not impliedly agree that what he is letting is a house suitable for occupation in its condition at the time. This distinction between furnished and unfurnished houses in reference to the construction of contracts for letting them, when there are no express agreements about their condition, has long been recognized in England, where it is held that there is an implied contract that a furnished house let for a short time is in proper condition for immediate occupation as a dwelling. *Smith v. Marrable*, 11 Mees. & W. 5; *Wilson v. Hatton*, 2 Exch. Div. 336; *Warehouse Co. v. Carr*, 5 C. P. Div. 507; *Sutton v. Temple*, *ubi supra*; *Hart v. Windsor*, *ubi supra*; *Bird v. Lord Greville*, 1 Cababe & E. 317; *Charsley v. Jones*, 53 J. P. Q. B. 280. In *Dutton v. Gerrish*, 9 Cush. 89, Chief Justice Shaw recognizes the doctrine as applicable to furnished houses; and in *Edwards v. McLean*, 122 N. Y. 302, 25 N. E. Rep. 483; *Smith v. Marrable*, and *Wilson v. Hutton*, cited above, are referred to with approval, although held inapplicable to the question then before the court. See *Cleves v. Willoughby*, 7 Hill, 83; *Franklin v. Brown*, 118 N. Y.

110, 23 N. E. Rep. 126. We are of opinion that in a lease of a completely furnished dwelling house for a single season at a summer watering place there is an implied agreement that the house is fit for habitation, without greater preparation than one hiring it for a short time might reasonably be expected to make in appropriating it to the use for which it was designed.

Judgment affirmed.

CHAPTER VI.

FIXTURES.

General Nature of Fixtures. Rules for Determining. Tenant's Fixtures Distinguished from Fixtures as Between Vendor and Vendee. Electric Light Fixtures.

CANNING v. OWEN.

22 R. I. 624, 48 Atl. 1033, 84 Am. St. Rep. 858. 1901.

Action by Letitia A. Canning against Ellen I. Owen and others. Judgment was rendered for plaintiff, and defendants filed a petition for a new trial. Petition granted.

TILLINGHAIST, J. One of the grounds of the defendants' petition for a new trial is that the trial court allowed testimony to be introduced by the plaintiff as to the conversion by defendants of certain electric light fixtures which had been attached to the Lake View Hotel property by plaintiff while she owned the same, and which fixtures, at the time they were so attached, were intended by the plaintiff to be and remain a part of the real estate. She did not detach, or attempt to detach, said fixtures until some time after the hotel property was sold under the mortgage thereof given by her. The question raised by the ruling complained of is whether such fixtures, so annexed to the freehold, remained personal property, so as to enable the mortgagor to maintain trover against the purchaser of the real estate at the mortgagee's sale, for refusal to give them up on demand. There is considerable conflict in the authorities as to whether such fixtures pass by a conveyance of the land on which they are placed or with which they are connected. Under the New York decisions, gas fixtures which are screwed onto the gas pipes of a building are held not to be so attached to the building as to form part of the realty. The decisions there seem to proceed upon the ground that such fixtures as are capable of being easily detached from the building, with-

out physical injury thereto, are mere furniture, and therefore not appurtenances to the building. See *McKeage v. Insurance Co.*, 81 N. Y. 38, and cases cited. In *Vaughen v. Haldeman*, 33 Pa. 522, it was held that gas fixtures attached to the gas pipes by the owner of the premises were mere personal chattels, and not "fixtures," in the proper sense of the term, and hence did not pass by a sheriff's deed of the real estate. In partial support of the opinion, the court cites *Lawrence v. Kemp*, 1 Duer 363, where it was decided that gas fixtures, when placed by a tenant in a shop or store, although fastened to the building, are not fixtures, as between landlord and tenant; and also *Wall v. Hinds*, 4 Gray, 256, where it was held that a lessee could take away gas pipes put in by him into a house leased to him for a hotel, and kept in place in the rooms by metal bands, though some of them passed through wooden ornaments of the ceiling, which were cut away for their removal. From the fact that the court cited these cases, it would seem that it took the view that substantially the same rule obtains regarding fixtures between vendor and vendee of real estate as obtains between landlord and tenant, which is clearly not so. The other case cited in support of the opinion, viz., *Montague v. Dent*, 10 Rich. 135, was clearly in point, as there it was held that gas fixtures, such as chandeliers and side brackets, attached to the gas pipes by the owner of the premises, were mere personal property, and not fixtures, and hence did not pass by a sheriff's sale of the real estate to which they were attached. In Minnesota the same rule obtains as to gas fixtures, although the court, while holding that they are not part of the realty, admits that it is only by reason of an arbitrary and inconsistent exception, which has been established by the authorities, that it feels called upon to so hold. The court say that the distinction between radiators, which it holds to be part of the realty, and gas fixtures, is not clear in principle. See *Capehart v. Foster*, 61 Minn. 132, 63 N. W. 257. In speaking of radiators, the court say: "Such radiators are an essential part of such plant, and are rarely furnished by tenants or temporary occupants of buildings as a part of the furniture brought with them or carried away with them, but the owner who furnishes the rest of such plant usually furnishes the radiators also. When, under ordinary circumstances, the owner of the building attaches such radiators

to his steam plant, it should be held that he intended them to be permanently annexed to the realty. We are cited to *Bank v. North*, 160 Pa. 303, 28 Atl. 694, which holds to the contrary. This case holds that such radiators are analogous to gas fixtures, and therefore not a part of the realty. By following the same process of reasoning by analogy, you would strip a house of all modern improvements, and by continuing the process you would overturn the greater part of the law of fixtures. A correct rule should not, in this manner, be overturned by an inconsistent exception." The court did hold, however, that the electric annunciator, which was attached to the wall, and to all the wires of the electric call or electric bell system of the hotel, was a part of the realty. Massachusetts decisions are classed, in the *American and English Encyclopedia of Law* (volume 13, New Ed., 666), with those which hold that gas fixtures are not a part of the realty as between vendor and vendee; and the plaintiff's counsel cites *Guthrie v. Jones*, 108 Mass. 191, and *Towne v. Fiske*, 127 Mass. 125, in support of this view. The first-named case is clearly not in point, as it was a case between landlord and tenant. And, moreover, it appears, by the second opinion given in the case (see page 195), that the first one was materially modified. The second case, while it holds that gas fixtures are in the nature of furniture, and do not lose their character as chattels by being affixed to the house by screws and cement, is not clearly in point as an authority in the case before us, for the reason that the gas fixtures and other fixtures in question in that case were purchased and affixed to the house by the plaintiff, who was not the owner thereof, but who had taken possession under a mere verbal agreement for the purchase thereof. No deed was ever given, and the question which arose in the case was whether the gas fixtures, portable furnace, and certain other things which the plaintiff had attached to the house during the time of his occupancy thereof became part of the realty, and the court held that they did not. The fact that the court, in support of its opinion, cited *Guthrie v. Jones*, *supra*, would seem to indicate that it treated the case before it as one between landlord and tenant, rather than as one between a vendor and vendee of real estate. *McConnell v. Blood*, 123 Mass. 47, is more nearly in point as an authority for the plaintiff, and it may be that the language there used

by the court is broad enough to include gas fixtures in the category of articles which do not become part of the realty by being affixed thereto. Like the case before us, it was one where the rights of the parties were to be determined by the rules which apply between mortgagor and mortgagee upon a foreclosure sale of the realty. The court said: "Many things which, as between landlord and tenant, would be removable as chattels, are regarded as part of the realty in favor of a mortgagee. In ascertaining what articles have become part of the realty, regard must be had to the manner in which, the purpose for which, and the effect with which they are annexed. * * * Whatever is placed in the building by the mortgagor to carry out the obvious purpose for which it was erected, or to permanently increase its value for occupation, becomes part of the realty, though not so fastened that it cannot be removed without serious injury, either to itself or to the building. On the other hand, articles which are put in merely as furniture are removable, though more or less substantially fastened to the building. So, too, machines not essential to the enjoyment and use of a building, occupied as a manufactory, nor especially adapted to be used in it, are removable, though fastened to the building, when it is clear that the purpose of fastening them is to steady them for use, and not to make them a permanent part of, or adjunct to, the building."

But, conceding that the Massachusetts decisions are in harmony with those of the other states above referred to, yet as the contrary view is taken by other courts of last resort, and as we are not bound by any previous decision of our own court in the premises, we feel at liberty to adopt a different rule, and one which, as it seems to us, is more logical, and more in keeping with the true idea as to what constitutes and goes to make up real estate as between the vendor and vendee thereof. We think the correct rule of law in such cases is the common-law rule, viz.: That whatever is once annexed to the freehold, which is designed by the owner thereof to be used and enjoyed in connection therewith, becomes a part of the realty, and passes with the conveyance thereof. *Graeme v. Cullen*, 23 Gratt. 290. And although this rule does not obtain as between landlord and tenant, in relation to articles attached to the freehold for ornamental or domestic use, and also with regard to "trade

fixtures," so called, yet it does obtain and should be strictly enforced as between vendor and vendee. It is doubtless true that, as a general thing, a tenant may remove whatever he has added to the realty, when he can do so without injury to the freehold, "unless," as said by Field, J., in *Sands v. Pfeiffer*, 10 Cal. 264, "it has become, by its manner of addition, an integral part of the original premises." "But not so a vendor. As against him all fixtures pass to his vendee, even though erected for the purposes of trade and manufacture, or for ornament or domestic use, unless specially reserved in the conveyance." And the same strict rule which applies between heir and executor applies equally between vendor and vendee and between mortgagor and mortgagee. 2 Kent, Comm. 411-413.

We are aware that it has been held in some cases that, in order to give chattels the character of fixtures, they must be so affixed to the realty that they cannot be removed without physical injury thereto; but we think the better opinion, as well as the better reason, is the other way, and in favor of regarding everything as a fixture which has been attached to the realty, with a view to enhance the value thereof, and for the purpose of being permanently used in connection therewith. Nor is it necessary that the intention of the owner in affixing such articles should be expressed in words; for it may be, and ordinarily should be, inferred from the nature of the articles affixed, the relation and situation of the parties interested, the policy of the law in respect thereto, the mode of annexation, and the purpose or use for which it is made. *Hutchins v. Masterson*, 46 Tex. 554. Under the old law, the principal test as to what was or was not a fixture was said to be the nature of the physical attachment to the soil. But this theory has long since been exploded. And as said by Mr. Washburn in his work on Real Property (volume 1, 5th Ed., p. 22): "While courts still refer to the character of the annexation as one element in determining whether an article is a fixture, greater stress is laid upon the nature and adaptation of the article annexed, the uses and purposes to which the land is appropriated at the time the annexation is made, and the relations of the party making it to the property in question, as settling that a permanent accession to the freehold was intended to be made

by the annexation of the article." See, also, *Davis v. Mugan*, 56 Mo. App. 311; *Ewell, Fixt.* p. 43, and cases in note 2. In other words, the question whether chattels are to be regarded as fixtures depends less upon the manner of their annexation to the freehold than upon their own nature and their adaptation to the purposes for which they are used. See the leading English case of *Elwes v. Mawe* (8th Ed.), 2 Smith, Lead. Cas. 169, and note. In *Farrar v. Stackpole*, 6 Greenl. 157, the court said: "Modern times have been fruitful of inventions and improvements for the more secure and comfortable use of buildings, as well as of many other things which administer to the enjoyment of life. Venetian blinds, which admit the air and exclude the sun whenever it is desirable so to do, are of modern use; so are lightning rods, which have become common in this country and in Europe. These might be removed from the building without damage; yet, as suited and adapted to the building upon which they are placed and as incident thereto, they are doubtless part of the inheritance, and would pass by a deed as appertaining to the realty." In *Johnson's Ex'r v. Wiseman's Ex'r*, 4 Metc. (Ky.) 357, the question arose whether chandeliers and gas fixtures passed by the sale of the house in question, and it was held that they did. The court said: "There can be no doubt that, upon the sale of the freehold, fixtures will pass, in the absence of any express provision to the contrary." Speaking of the fixtures in question, the court said: "Purchasers and strangers, seeing them in their appropriate places, and no objections made to the sale, would regard them as a part of the freehold, and would bid for the property with the belief that the acquisition of it would confer upon them the right to these articles which, from their nature and position, seemed to be incident to and a part thereof, and thereby be induced to bid more than they would otherwise have done." *Walmsley v. Milne*, 7 C. B. (N. S.) 115, is a strong authority for the principle that where an article is once affixed by the owner of the fee, though only affixed by bolts and screws, it is to be considered as a part of the realty; at all events, where the object of setting up the articles is to enhance the value of the premises to which they are annexed for the purpose to which those premises are applied. See, also, *Holland v. Hodgson*, 7 L. R. C. P. 328; *Parsons v. Copeland*, 38 Me. 537;

Strickland v. Parker, 54 Me. 263; Price v. Brayton, 19 Iowa, 311; Teaff v. Hewitt, 1 Ohio St. 511; Bank v. Kercheval, 65 Mo. 682; Pea v. Pea, 35 Ind. 387; Fechet v. Drake (Ariz.) 12 Pac. 694; Arnold v. Crowder, 81 Ill. 56.

Adopting the general rule, then, as we do, that, as between the vendor and vendee of real estate, whatever has been physically annexed or affixed thereto by the owner, under the conditions aforesaid, becomes part and parcel thereof, and passes with the conveyance of the estate, it follows that the electric light fixtures in question, which take the place of and serve the same purpose as ordinary gas fixtures, passed to the defendants by the conveyance referred to, and hence that the ruling complained of was erroneous. We can see no reason whatever why such fixtures are not as much a part of the realty as radiators, water faucets, set tubs, bath tubs, and bowls, portable furnaces connected with hot-air pipes for heating the building, storm doors and storm windows, window blinds, whether inside or outside, fire grates, pumps, mantels, and such other things as are annexed to the freehold with a view to the improvement thereof. All of these things, though mere chattels before their annexation to the freehold, are no longer such after their annexation, any more than the other materials which go to make up the house, but then become part and parcel of the real estate, and the mere fact that they can be removed therefrom without physical injury to the freehold does not change their character as between the vendor and vendee of the realty. That the authorities upon the question as to what are fixtures in cases of this sort are hopelessly at variance is apparent, upon even a casual examination thereof. Indeed, it has frequently been said that there is no other legal term in so general use as the word "fixtures" to which there have been more different and contradictory significations attached. Ewell, Fixt. 1. We are therefore at liberty, as before suggested, to follow that line of decisions which seems to us the most reasonable and logical, and the conclusion already stated has been reached in that way.

In relation to the statement, hereinbefore made, to the effect that we are not bound by any former decision of our own court in the premises, it is proper to say that we have not overlooked the definition of the term "fixtures" as laid down by Greene,

C. J., in *Gas Co. v. Thurber*, 2 R. I. 15. But, as that was not a case where the gas company owned the land in which the pipes in question were laid, it is not opposed to the view which we have now taken. Indeed, it rather supports our view, as the court said, that "if the gas company owned the land in which the pipes were laid, we should have no doubt they would be fixtures." * * *

Right of Tenant to Remove Fixtures.

MUELLER v. CHICAGO, M. & ST. P. RY. CO.

111 Wis. 300, 87 N. W. 239. 1901.

Appeal from circuit court, Pepin county; E. W. Helms, Judge.

Action of conversion by Anton Mueller against the Chicago, Milwaukee & St. Paul Railway Company. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

CASSODY, C. J. This is an action to recover damages for the wrongful conversion of a lean-to upon the section house of the defendant at Savoy, near Maxville station. Issue being joined, and trial had, the court, at the close of the testimony on the part of the plaintiff, granted a nonsuit, and from the judgment entered thereon the plaintiff brings this appeal.

It appears from the record, and is undisputed, in effect, that in the spring of 1897 the defendant employed the plaintiff to work for it as section foreman on that section, with the understanding and agreement that the plaintiff and his family should occupy the section house of the defendant at that place; that such section house was 16 feet wide by 26 feet long, and 1½ stories, or 12 feet, high, and situated upon blocks, and upon the land of the defendant, and about 150 feet from the main track, and had an addition to it at the time, which the plaintiff removed after he moved into the section house; that while the plaintiff was so occupying such section house with his family, he did, with the knowledge and consent of the defendant, purchase lumber, and constructed a small lean-to, for a kitchen, against said section house, at the cost and of the value of \$67, and also with such knowledge and consent put in a pump of

the value of \$7; that such lean-to had two common, middle-sized windows of four lights each, and one door; that the section house had boards up and down, and the plaintiff nailed a two by four piece of lumber on the section house, and fastened the lean-to to that; that the floor was a double floor, and matched, and overhead there was a single pine flooring, matched; that the inside was ceiled up with flooring; that, after the section house and lean-to had remained in that condition for over two years, changes were made on the outside, and, while the plaintiff and his family were still occupying the same as tenant of the defendant, the defendant's bridge carpenters papered and sided the same as directed by the plaintiff, but so that the siding did not go further than the section house, leaving a seam between it and the lean-to; "that, after the plaintiff had placed the repairs and improvements on said section house in the manner aforesaid, and while he was living in said house, the defendant covered all the same with outside sheeting or lap-siding in the usual way, and thereby converted all the same to its own use and benefit, and prevented the plaintiff from removing all the same, as he intended to do in case the defendant did not buy the same from him; and that, soon after the defendant had covered the lumber that the plaintiff had placed on its said building and put in said kitchen, it discharged him from its said employment." The plaintiff was so employed by the month for no stated time, and could quit whenever he pleased, and could be discharged at the pleasure of the defendant. He was discharged in the spring of 1900. After he and his family had moved away, the plaintiff asked the defendant's roadmaster if he could not pay the defendant for the siding it had so placed upon the lean-to, and for the two days' work in putting it on, and then be allowed to take the lean-to away, and remove it to Durand; but the roadmaster replied that that would destroy or injure the building. The plaintiff paid no rent for so occupying the section house with his family, and never agreed to. Upon the facts stated, it is obvious that the lean-to became a fixture on the premises of the defendant, within the principles of law repeatedly and recently stated by this court. *Gunderson v. Swarthout*, 104 Wis. 186, 190-192, 80 N. W. 465, and numerous cases there cited; *Fuller-Warren Co. v. Harter*, 85 N. W. 698, 700-702, and

cases there cited. It was physically attached to the section house, and hence to the realty. It was adapted to the use and purpose to which the realty was devoted. It was the intention of the plaintiff, in constructing the same, that it should be so attached, and that it should be used in connection with the section house. There is no claim nor pretense that the defendant ever agreed that the plaintiff might remove the lean-to from the premises. Certainly, a tenant of a dwelling house, in possession under a lease which does not provide that he may remove fixtures placed thereon by him, cannot, after he has surrendered possession to his landlord, re-enter, and remove such fixtures, without permission of his landlord. *Yates v. Bachley*, 33 Wis. 185; *Fitzgerald v. Anderson*, 81 Wis. 341, 51 N. W. 554; *Keefe v. Furlong*, 96 Wis. 219, 70 N. W. 1110; *Friedlander v. Ryder*, 30 Neb. 783, 47 N. W. 83, 9 L. R. A. 700. We find no error in the record.

The judgment of the circuit court is affirmed.

CHAPTER VII.

THE LANDLORD'S RIGHTS, DUTIES AND LIABILITIES.

Duty to Repair—Injury to Tenant's Wife—Whether Landlord Liable.

BORGGARD v. GALE.

205 Ill. 511, 68 N. E. 1063. 1903.

Error to Appellate Court, First District.

Action on the case by Anna M. Borggard against Stephen F. Gale. From a judgment of the Appellate Court (107 Ill. App. 128) affirming a judgment of the superior court in favor of defendant, plaintiff brings error. Affirmed.

HAND, C. J. This is an action on the case, brought by the plaintiff in error in the superior court of Cook county against the defendant in error to recover damages for an alleged injury caused to her by reason of her stepping into a hole in the floor of certain premises rented by her husband from the defendant in error for a store. A trial resulted in a judgment in favor of the defendant in error, which has been affirmed by the Appellate Court for the First District, and a writ of error has been sued out from this court to review the judgment of the Appellate Court.

The only ground relied upon in this court for a reversal which we can consider is the giving of the second and third instructions offered upon behalf of defendant in error. The second instruction informed the jury that the defendant was not liable to the plaintiff for any injuries which she may have sustained after her husband took possession of the premises under the terms of the lease, even though said premises were let with a nuisance upon them by means of which the injury was received, unless, through the fraud or concealment of the defendant, the husband was induced to take possession of the premises without

knowledge of the existence of such nuisance. The only criticism made upon the instruction is that it states the defendant is not liable unless by "fraud or concealment" practiced by him the husband was induced to take possession of the premises without knowledge of the existence of the defective condition of the floor. The lease which was in force at the time of the injury contained the following clause: "That he [plaintiff's husband] has examined and knows the condition of said premises, and has received the same in good order and repair, and that no representation as to the condition or repair thereof has been made by the party of the first part or his agents, prior to or at the execution of this lease, that is not herein contained or herein endorsed; that he will keep the said premises in good repair during this lease at his own expense." The plaintiff testified that there was a hole 6 by 12 inches in size in the floor of a small room opening off of the storeroom when her husband took possession of the premises, the existence of which was unknown to her or her husband; that a day or two thereafter she unavoidably stepped into said hole, and was severely injured. One Locke, defendant's agent, who leased the premises to plaintiff's husband through the plaintiff in error, testified that prior to the injury the plaintiff pointed out to him the hole in the floor, and he agreed to have the same repaired; that the carpenter was engaged in making repairs upon the premises at the time the injury occurred; and that he had requested the plaintiff and her husband not to occupy the premises until the repairs were completed, but that they moved into the same before the repairs were complete. The testimony of the plaintiff and Locke was all the evidence bearing upon the subject.

The general rule is that a landlord is not bound to make repairs unless he has assumed such duty by express agreement with the tenant. An exception to the rule, however, exists where there are defects in the demised premises, attended with danger to an occupant, which a careful examination would not disclose, which are known to exist by the landlord and are not known to the tenant. In such case a duty rests upon the landlord to notify the tenant of such defects. *Sunasack v. Morey*, 196 Ill. 569, 63 N. E. 1039. The duty resting upon the landlord to notify the tenant of a defect in the premises which a careful examination would not disclose, but of which the landlord has

notice while the tenant has not, we think may well be placed upon the ground, in many cases, that a failure to make such disclosure would be a fraud upon the tenant. For instance, if the premises were infected with a contagious disease, as was the case in *Snyder v. Gorden*, 46 Hun, 538; or impregnated with sewer gas, the presence of which was denied by the landlord, as in *Sunasack v. Morey*, supra. But the instruction given in this case did not require that the plaintiff should prove fraud before a recovery could be had, but only concealment of the defect, as the disjunctive "or" was used in the instruction between the words "fraud" and "concealment," so that, if the evidence showed the hole in the floor to have been a latent defect, that the landlord had notice of its existence, and the husband of the plaintiff had not such notice, and the landlord concealed the defect by failing to perform his duty by notifying him of its presence, unless the plaintiff had actual notice thereof there might be a recovery; and this much proof seems to be required by all the authorities to entitle the plaintiff to recover. *Sunasack v. Morey*, supra; *Cowen v. Sunderland*, 145 Mass. 363, 14 N. E. 117, 1 Am. St. Rep. 469; *Anderson v. Hayes*, 101 Wis. 538, 77 N. W. 891, 70 Am. St. Rep. 930. * * * We do not think the giving of said instruction constituted reversible error.

We have examined the third instruction, and think, in view of the evidence, it states the law correctly, and that the objection made thereto is hypercritical, and without force.

Finding no reversible error in this record, the judgment of the Appellate Court will be affirmed.

Judgment affirmed.

Landlord's Right to Enter to Make Repairs.

DARLINGTON v. DE WALD.

194 Pa. St. 305, 45 Atl. 57. 1900.

Appeal from court of common pleas, Allegheny county.

Action by Harry Darlington against W. H. De Wald and others, doing business as De Wald, Wuesthoff & Co. Judgment for plaintiff. Defendants appeal. Affirmed.

GREEN, J. * * * The learned trial judge gave very clear instructions to the jury, explaining with much preciseness and entire correctness the very questions upon which it would be necessary for them to pass. He explained fully the meaning of ordinary wear and tear, the character of the repairs which the defendants were required to make in order to preserve the property in the same condition as when it was received, and left to them exclusively the determination of the question whether the defendants had performed their covenant in this respect. In defining particularly what question they must decide, he said, speaking of the defendants: "They made those repairs, but the contract was to hand the building over, not with the repairs kept in perfect condition, but just as good as it was when Mr. Darlington handed over the property to them. Now, did they do that? If they did not, to what extent was the property damaged by reason of their treatment of it during the term that they had possession? They were bound to return it in as good condition as they found it. They were not bound to make repairs under the terms of the lease. They could have left the building stand just as they got it, without any repairs. But, if they injured the building, if they caused it to be in worse condition, ordinary wear and tear taken into consideration, than it would have been if they had done what they ought to have done, they are responsible for the condition, and are bound to pay the landlord, Mr. Darlington, an amount that would put the building in as good condition as it was when they got it. The first question is, what was the condition, under the testimony, of the building at the time the defendants got it? And then, what was the condition at the time these repairs were made by the plaintiff? They were not made against the wishes of the tenants; that is apparent. They were made previous to the termination of the lease. That is not material, so far as this case is concerned. They were made with the implied consent of those in possession; and the simple question is, so far as made, were they necessary to put the premises in the condition they were at the time the defendants got possession of them? If they were made then, the plaintiff is entitled to recover a verdict for the fair value of what it cost; not for all he did, nor for what he may have seen fit to do, but just for whatever was necessary to put the building in the condition it was at the time

the defendants got possession." It seems to us this instruction was perfectly correct in every legal sense. If the defendants were bound by their covenant—as they certainly were—to put the property in as good condition as it was when they took possession, the question to be determined was, had they done this? and, if they had not, and the plaintiff has thereby been compelled to do it by reason of their default, he certainly was entitled to recover from the defendants the money he was obliged to pay for that purpose. The court was careful to say to the jury that the plaintiff could not recover the whole amount he expended, but only that proportion of the amount which he was obliged to expend to restore the property to its condition as it was when the defendants received the property from him. As we understand the law, this was the exact question the jury had to decide, and they did decide it. The plaintiff expended in the works and repairs that he made \$8,994.19, and the jury allowed him \$1,200, as representing that portion of his expenditure which they considered the defendants ought to have incurred.

As to the fact that the plaintiff entered upon the premises and made repairs before the expiration of the lease, what the court said on that subject was perfectly correct. He did enter upon the premises and do that work before the end of the term, but he did so most manifestly with the consent of the defendants. There is not a scrap of testimony showing that they, or any of them, ever made the slightest objection to what he was doing. They could not help but see what he was doing; and by making no objection, and looking quietly on while the work was being done, their consent is necessarily implied. Moreover, two of them (the Wuesthoffs) left the premises voluntarily in September, 1896, several months before the end of the term, and settled with the plaintiff for all claims for rent of the premises. The other defendant, who was a relative of the plaintiff, remained in possession. None of the defendants did anything towards restoring the property to its original condition, and the plaintiff was certainly not bound to wait until the end of the term and take the risk of the falling of the walls, if there was such a risk, before doing the necessary work to preserve the building. In this view of the case, the authorities cited for the defendants, to the effect that the landlord could not enter

and make repairs until after the end of the term are not applicable. Of course he could do so with the consent of the tenants. And the authorities to the effect that no action could be brought to recover the amount expended in making the necessary repairs until after the term had expired are not applicable, because the present action was not brought until after the term had expired.

On the question of damages the learned court below charged that, if the plaintiff was entitled to recover, he could recover the cost of that part of the repairs which the defendants failed to make, and which the plaintiff was obliged to make on account of their dereliction; and, as that would be the amount of the damage he would really sustain, we know of no reason why that should not be the correct measure of the damages he was entitled to recover. We are not referred to any Pennsylvania, nor, indeed, to any American, authority which holds that the true measure is the value of the injury to the reversion, and therefore we do not see any sufficient reason for adopting that measure. The latter rule may be applicable where, the landlord being out of possession, and the tenant having left the property without the proper repair being made, the landlord brings his action for non-repair; but where he has made the repair himself the cost of the repair would be his proper measure of damages. In 3 Sedg. Dam. § 990, and in *Watriss v. Bank*, 130 Mass. 343, it was said that, where the tenant leaves the premises out of repair, the measure of damages is the cost of putting them into repair, and not the depreciation in the value of the property. The assignments of error are all dismissed.

Judgment affirmed.

CHAPTER VIII.

THE TENANT'S RIGHTS, DUTIES AND LIABILITIES.

Tenant Cannot Deny Landlord's Title.²

NICROSI v. PHILLIPI.

91 Ala. 299, 8 So. 561. 1890.

Appeals from city court of Montgomery; T. M. Arrington, judge.

Actions of unlawful detainer, and for use and occupation.

McCLELLAN, J. These two cases, which were argued and submitted together, involve, respectively, the right of the administrator of Jeannette Guily, deceased, to maintain the action of unlawful detainer for certain lands alleged to have belonged to her in her life-time, and an action for use and occupation of the same by Phillipi for a period subsequent to her death, he having held over after the expiration of a term for which he entered, and which expired before her death. The general charge was asked by both parties on the trials below, was denied to plaintiff, and given for the defendant; and this action of the city court is now presented for review. The principles of law applicable to the facts of the case, and obtaining with respect to both forms of action, are few and familiar. We will, for convenience, first consider separately the unlawful detainer case. That action is cognizable before justices of the peace. These officers have, and can have, under the present constitution, no jurisdiction to try questions of title to land. Const. art. 6, § 26; Webb v. Carlisle, 65 Ala. 313. The statute conferring the jurisdiction here invoked expressly inhibits all inquiry into the merits of the title. Code, § 3389. And the decisions of this and all other courts are uniform to the effect that title is not within the issue involved in this action. Welden v. Schlosser, 74 Ala. 355; Houston v. Farris, 71 Ala. 570; 8 Amer. & Eng. Enc. Law, p. 126.

² See also Davis v. Williams, *supra*.

The thing that is involved is such right of possession between the parties to the record, as may be worked out and adjudged aside and apart from all considerations of title; and, hence, wholly regardless of whether the plaintiff or defendant or a third person has the superior claim to the ownership of the property. The action is maintainable by any one entitled to the immediate possession against any one unlawfully withholding possession, where the relation of landlord and tenant exists between the parties. It is insisted here that the plaintiff's right to recover must in all cases rest upon a prior actual possession, actual in the sense of being *possessio pedis* by him personally, and prior in the sense of antedating defendant's entry. This is not the law. The books are full of declarations to the effect that in this action, and in that of forcible entry and detainer, the plaintiff must show prior actual possession. We have no purpose to dissent from that view in any particular. It is not meant thereby, however, that the plaintiff in unlawful detainer must show actual possession either in himself or in another for him, antedating the entry of the defendant. What is meant is that he shall prove an actual possession in himself prior in point of time to the inception of the wrongful possession of the defendant; prior to the beginning of the unlawful detainer by the defendant. Where the gravamen of the action is forcible entry, the plaintiff's possession must, of course, antedate the entry, since that is an offense only against the then existing possession, and must be redressed by the party who had that possession. But here the offense is against the possession which existed up to the moment of time when the defendant ceased to hold under his lease, and assumed to hold otherwise than in subordination to him whose possession he theretofore had. So long as the tenant holds under his lease, his actual possession is the actual possession of the landlord; and proof of this actual possession, through and by his tenant, prior to and continuing to the time of the beginning of the unlawful detainer, fully meets the requirements of the doctrine under consideration. Conditions of fact are very numerous, which, while involving no prior actual possession in the person of him who asserts the right to the possession, yet constitute the relation of landlord and tenant between the parties, with all the rights, remedies, limitations, and estoppels incident thereto. Thus,

for instance, the relation exists between the heir, upon descent cast, and the tenant of the ancestor, (*Beezley v. Burgett*, 15 Iowa, 192; *Turly v. Foster*, 2 A. K. Marsh. 204; *Stinson v. Gosset*, 4 Ala. 170; *Dwine v. Brown*, 35 Ala. 596; *Hightower v. Fitzpatrick*, 42 Ala. 597); between a mortgagee, after default, and a mortgagor, who remains in possession under a contract to pay rent (*Strauss v. Harrison*, 79 Ala. 324); between a vendee and a vendor who retains possession after conveyance under like agreement (*Vancleave v. Wilson*, 73 Ala. 387); between the personal representative, who has taken the statutory steps necessary to an appropriation of the decedent's land or its rents to the debts of the estate, and a tenant originally let in by the latter (*Lass v. Eisleben*, 50 Mo. 122; *Scott v. Lloyd*, 16 Fla. 151; *Moody v. Ronaldson*, 38 Ga. 652); between a purchaser from the lessor, pending the term, and the tenant under the lease (3 Brick. Dig., p. 599, § 28 et seq.); and, in general, it may be said, between a person in possession who accepts a lease from or attorns to another, who in good faith claims title to the land. And in all such cases, the landlord is in actual possession by his tenant, and upon the possession may well ground his right to oust the tenant, who holds over after the expiration of the term, in the action of unlawful detainer. *Tayl., Landl. & Ten.*, §§ 705, 713, et seq.; *Lecatt v. Stewart*, 2 Stew. (Ala.) 474; *Beck v. Glenn*, 69 Ala. 126; *King v. Bolling*, 77 Ala. 594. In the case at bar, the defendant, though at the time and theretofore in possession of the premises, in December, 1887, accepted a lease from the plaintiff, as administrator of Jeannette Guily, retained possession thereunder, and paid for a time the monthly installments of rent as they fell due. His possession during the term of this lease was the possession of Nicrosi; being actual, plaintiff's possession was actual, and, antedating the unlawful detention, was prior possession in the plaintiff in the sense necessary to affording a predicate for the recovery here sought. One of the familiar incidents of the relation of landlord and tenant is the estoppel which seals the lips of the latter to deny the title of the former; and, in the application of this doctrine, it is entirely immaterial whether the tenant was let into the possession by the landlord, or, being already in possession, accepts a lease from or attorns to the party claiming to be the landlord. In the absence of fraud and mistake, the ten-

ant, however, or under whomsoever he entered into possession, is estopped to deny the title of the party under whom he holds by the acceptance of a lease, or by attornment. *Lyon v. Washburn*, 3 Colo. 201; *Thayer v. Society*, 20 Pa. St. 60; *McConnell v. Bowdry*, 4 T. B. Mon. 392; *Patterson v. Hansel*, 4 Bush, 654; *Richardson v. Harvey*, 37 Ga. 224; *Berridge v. Glassey* (Pa.), 7 Atl. Rep. 749; *School-District v. Long* (Pa.), 10 Atl. Rep. 769; *Tyler v. Davis*, 61 Tex. 674; *Terry v. Ferguson*, 8 Port. (Ala.) 502; *Griffith v. Parmley*, 38 Ala. 393; *Beck v. Glenn*, supra; *King v. Bolling*, supra. * * *

Destruction of Premises. Tenant's Liability for Rent. Effect of Statute. Surrender of Premises.

GAY v. DAVEY.

47 Ohio St. 396, 25 N. E. 425. 1890.

Error to district court, Hamilton county.

DICKMAN, J. On the 7th day of July, A. D. 1879, James P. Gay leased to John R. Davey and A. B. Allen, the defendants in error, certain premises in the city of Cincinnati for the term of three years from that day, the lessees to have the privilege of a further term of two years, commencing with the 7th day of July, 1882. The premises, used for manufacturing purposes, are described as situated in the city of Cincinnati, being three rooms on the front of the first, second, and third floors of James P. Gay's main building fronting on the north side of New street, and the room in the third story of the addition to the main building; also a strip of ground lying on the west side of the main building, being 12 feet in width on the north side of New street, and running back the same width to the building described as the addition to the main building, the lessor to erect a one-story brick office 12 feet by 16 feet adjoining the southwest corner of the building on New street, for occupancy by the lessees. As rent, the lessees were to pay during the term of three years the sum of \$125 per month, payable monthly, commencing on the 7th day of August, 1879, and on the 7th day of each and every month thereafter during such term. The

entire building, including the apartments leased to Davey and Allen, was destroyed by fire on the 11th day of December, 1880, but was rebuilt by the lessor, and was ready for occupancy in the early part of January, 1881. When the building was restored, the lessees declined to pay rent from the time of restoration, and the lessor commenced suit in the superior court of Cincinnati to recover the rent from January 7, 1881, to May 7, 1881. The lessees set up in defense that, by the terms and provisions of the lease under which they had occupied the premises, it was stipulated that, if the occupied premises were destroyed or rendered untenable by fire or unavoidable accident, they were not to be required to pay any rent thereafter; that the premises were totally destroyed on the 11th day of December, 1880; that they did not use, occupy, or enjoy the premises at any time thereafter; that the premises were destroyed without any default or neglect on their part; and that the lessees thereupon surrendered possession of the premises to the lessor. The lessor, in reply, denied that the premises included in the lease were totally destroyed by fire, and alleged that there was only a partial destruction of the same, the brick office not being materially injured, and continuing tenantable; and further denied that the premises were ever surrendered to the lessor by the lessees. The lease contained the covenant "that said lessees will pay said rents, in manner aforesaid, except said premises shall be destroyed or rendered untenable by fire or unavoidable accident." Before the trial, the death of the plaintiff was suggested, and it was ordered that the action be revived in the name of Sarah E. Gay, the plaintiff in error, as executrix of the last will and testament of James P. Gay, deceased. On the trial, a jury being waived, the court, upon the testimony, found in favor of the plaintiff, and entered judgment for the amount claimed, with interest and costs. The defendants thereupon filed their motion to set aside the judgment, and for a new trial, mainly on the ground that the finding of the court was against the weight of the evidence, which motion the court overruled.

* * * * *

In remanding the cause for further proceedings, there are legal principles that claim consideration. Where the tenant, who expressly covenants to pay rent, has not protected him-

self by a saving clause in the lease; the proposition is generally true that he will be bound to continue the payment of rent after the destruction of the tenement by fire or unavoidable accident, and will have no relief against such express covenant. Having by his own contract created a duty or charge upon himself, he will be bound to make it good, notwithstanding any accident or inevitable necessity, because against such casualty he might have provided by his own contract, if he had thought proper to do so. *Linn v. Ross*, 10 Ohio 412. But under the facts, as it is claimed they exist, the defendants in error insist that they are discharged from the payment of rent by the stipulation in the lease that if the premises occupied by them should be destroyed, or made untenable by fire or unavoidable accident, they were not thereafter to be required to pay rent. If the lease had contained a covenant on the part of the lessor to rebuild the premises if destroyed, and he had rebuilt in accordance with his covenant, the stipulation would not discharge the lessees from liability to pay rent. But the lessor was under no obligation to rebuild, and the rights of his tenants secured by stipulation in the lease, and accruing immediately upon the destruction of the premises by fire, were not to be kept in abeyance by the contingency of the lessor's concluding to rebuild. If, however, after the building was burned, the owner was requested and induced by the lessees to rebuild for the lessees' use and occupation, they could not justly avoid the payment of rent, after the building had been restored to its former condition. Furthermore, it is contended in behalf of the defendants in error that they are relieved from the payment of rent under § 4113 of the Revised Statutes. That section reads as follows: "The lessee of any building which, without any fault or neglect on his part, is destroyed or so injured by the elements, or other cause, as to be unfit for occupancy, shall not be liable to pay rent to the lessor or owner thereof, after such destruction or injury, unless otherwise expressly provided by written agreement or covenant; and the lessee shall thereupon surrender possession of the premises so leased." The obvious design of this statutory provision is to relieve from hardship the tenant who has inadvertently neglected to protect himself by express covenant in his lease against the necessity of paying rent after the leased premises have been destroyed

by fire or other casualty. But, to secure the benefit of the statute, the tenant must surrender or yield up all that remains of the premises embraced in the lease, without any purpose or intention of resuming possession thereof. The legislature has absolved the tenant from an onerous obligation, but the burden is removed only upon his compliance with the statutory condition. The statute, in case the buildings are destroyed, does not clothe the landlord with the power of terminating the lease, and if the tenant alone is to have the option of so doing, and may be discharged from the obligation to pay rent, he must give up the possession and control of the premises to him who is entitled to the reversion. If he would preserve the lease in full force, and avail himself of its advantages, he must also bear any incidental hardship that may arise during its continuance. The clause in the statute for surrendering possession of the premises would be without significance, if not construed as qualifying the provision for a release of the tenant from the payment of rent. In *Johnson v. Oppenheim*, 55 N. Y. 280, the court of appeals, in construing chapter 345 of the New York Laws of 1860, which is substantially the same as the statute of Ohio, in *pari materia*, say: "The act provides that, upon the destruction or injury of leasehold buildings so that the same are untenable, the tenant shall not be liable or bound to pay rent, and that he may thereupon quit and surrender the possession of the premises. The tenancy is not made absolutely to cease, except at the option of the tenant. He is relieved from his obligation, if he chooses to avail himself of the provisions of the act, or he may perform the covenants of his lease and retain the benefit of it; but he cannot have the benefit of the law, and at the same time repudiate its obligations. If he elects absolution from its obligations, the act, by necessary implication, imposes as a condition the surrender of the premises." Such is manifestly the correct interpretation of the statute. But it is contended the rule is well settled that, in the absence of covenant, when the subject-matter of the demise is destroyed by fire or other casualty—as a house, where the land on which it rests is not rented, or apartments in the house, whether for purposes of trade or otherwise—the destruction of the building terminates the relation of landlord and tenant, and there is nothing left to surrender to the owner or lessor. While this

may be a correct statement of the general principle, the contract of lease in the case at bar was entire, and embraced, not only the rooms in the destroyed building, but also the one-story brick office, and the strip of ground lying on the west side of the main building. If, therefore, the building was totally destroyed by fire, and a surrender of the leased rooms became impossible, it could not be so said of the office and strip of ground, if the lessees, after the fire, continued to use and occupy the same until the building was restored and ready for occupancy. As to those portions of the demised premises that were not destroyed, and remained tenantable, there was no apparent obstacle in the way of a surrender as contemplated in the statute. The final judgment in favor of Davey and Allen should be reversed, and cause remanded.

Judgment accordingly.

CHAPTER IX.

RENT.

Tenant Holding Over Term. Question of Rent. What Constitutes a Holding Over.

HERTER v. MULLEN.

159 N. Y. 28; 53 N. E. 700. 1899.

Appeal from supreme court, appellate division.

Petition by Albert Herter against Jeremiah J. Mullen and another. From a judgment of the appellate division affirming a judgment for plaintiff (41 N. Y. Supp. 708), defendants appeal. Reversed.

O'BRIEN, J. The plaintiff's action was to recover rent alleged to be due upon the lease of certain premises for the month of May, 1895, and the six following months of that year. The lease was executed in March, 1894, and was to terminate in one year from the 1st of May following. The defendants, who were the tenants under the lease, vacated the premises on May 15, 1895, but, as it was claimed that they held over after the expiration of the lease for 15 days, it was held that they were liable for the rent for another year, and the plaintiff recovered for the seven months of the year that had elapsed before the commencement of the action. The rent, by the terms of the lease, was payable monthly, and the court directed a verdict for the plaintiff for \$558.63, being the stipulated rent for the seven months, with interest.

The complaint alleged the making of the lease, the possession thereunder by the defendants, and that they had continued in possession until the time of the commencement of the action. The defendants, in their answer, allege that they surrendered possession of the premises to the plaintiff on May 15, 1895, and that he accepted such surrender; that they had notified him in the month of February preceding that they would not take or

keep the house for another year after May 1, 1895, when the term fixed by the lease expired; that, after this notice, the plaintiff was permitted to show the premises to persons wishing to hire or purchase them, and to place upon the house the usual notice that it was to let; that the defendants moved from the house, with all their property and belongings, and that of the family, on the 1st day of May, 1895, before the lease expired, except from the bedroom, where their mother was confined by a dangerous illness until the 15th of May following, when she was removed, and the premises wholly vacated; and that they were forbidden by the physician in charge from moving or disturbing the mother during the 15 days, and were informed by him that it would imperil her life if an attempt was made to remove her. These affirmative allegations in the answer were pleaded together as a single defense. On the trial it was conceded that the defendants had the affirmative of the issues, since the written lease was produced and admitted by the pleadings and the possession under it.

It appears from the record that the defendants' counsel then proceeded to open the case to the jury, and at the close of the opening the court suggested that the controversy would resolve itself into a pure question of law, and that the facts should be agreed upon. The plaintiff's counsel then admitted that the notice from the tenants of their intention to surrender up the premises on the 1st of May had been given in February, as alleged in the answer. The defendants' counsel then stated that the reason for holding over after the expiration of the lease was the sickness of the defendants' mother, she then being a member of their family; and he stated that, unless he could have it admitted as it is pleaded, he wanted no admission whatever. The plaintiff's counsel then admitted that fact, as set forth in the answer. The last clause of the answer contained an allegation that the holding over was with the knowledge and permission of the plaintiff, the landlord, and at the suggestion of the plaintiff's counsel this allegation was withdrawn. The case then states that upon the record and the defendants' counsel's opening, the court, at the request of the plaintiff's counsel, directed a verdict against the defendants for \$558.63, and that the defendants excepted to this direction. * * *

But, perhaps, the most important question in the case arises

upon the facts and circumstances which it is claimed constitute a holding over by the tenant after the expiration of the term specified in the lease. For every purpose necessary to the determination of that question we must assume that the facts are as alleged in the answer, since it must have been upon that assumption that the verdict was directed. There can be no doubt that the rule of law is settled beyond debate or controversy which permits the landlord, at his election, to treat the tenant as holding for another year when the latter remains in possession after the expiration of the term. When the demise is for a definite term of one year at a fixed rent, and the tenant holds over after that term expires, the landlord may treat him as a tenant for another year, and collect rent accordingly. *Haynes v. Aldrich*, 133 N. Y. 287, 31 N. E. 94; *Adams v. City of Cohoes*, 127 N. Y. 175, 28 N. E. 25. But the question is whether the tenant did, in fact, hold over after the expiration of the term, within the meaning of that rule. If it is an arbitrary one, applicable under all circumstances and conditions, and to be enforced in every case, without regard to the reason upon which it is founded, it may be said that, in a strict sense, there was a holding over in this case. But this rule that obtains in the relation of landlord and tenant is a part of the common law, the chief merit of which is supposed to consist in its adaptability to changing circumstances and new conditions as developed in the progress of time. It is not an unchangeable code, like that of the Medes and Persians, but a system that has grown up with the growth of civilization, and is capable of being molded to meet the wants of society in every stage of its progress. From the facts disclosed by the answer in this case the tenant vacated the house at the expiration of the term, except one bedroom, in which a member of his family was confined by illness so serious that he was warned by the physician that any attempt to remove her would imperil her life. The decision of the learned trial court in the case virtually holds that on the last day of the tenant's term he was placed in a position where he must either pay rent for another year for a house that he did not intend to occupy, or to take the risk of becoming, in a certain sense, responsible for the death of his mother by attempting to remove her from a sick room against the protest of a physician. This would seem to be pushing a rule of law applicable to the relation of

landlord and tenant to a point which makes it very unreasonable, if not absurd; and, before assenting to such an application of it, we are naturally forced to inquire whether there was, in fact, any such holding over by the tenant in this case as the rule fairly contemplates. Does a tenant who, on the last day of the term, is upon his death bed, or is quarantined in his house by the public authorities to prevent the spread of some dangerous or infectious disease, or is insane, or compelled to remain in the house, against his will, by some superior force or stress of circumstances, hold over within the meaning of the law, or in the sense that permits the landlord to treat him as a tenant for another year? The principle upon which the rule is founded is that the holding over is such an act of the tenant that the law implies a contract on his part, or leasing of the premises for another year. But whenever the law implies a contract from the act or conduct of the party, the act itself, whatever it may be, must be voluntary. The law does not imply a contract or obligation from an act of the party which proceeds from mistake or fraud, or which results from force or coercion of any kind, or is due to any stress of circumstances which involves peril to his life or that of some member of his family. To infer a promise or contract from any act plainly resulting from such causes would manifestly be contrary to reason and justice. The question therefore occurs whether the tenant in this case, by failing to remove his mother from the bedroom in the house, or by her presence there during the 15 days after the expiration of the term, should be held for another year's rent, on the principle that an agreement to hold for another year is to be implied by law from his conduct under the circumstances. If this question must necessarily be answered in the affirmative, there would be no grounds for any further discussion. But it seems to me that, upon reason and all the analogies of the law, a hiring for another year cannot and should not be implied against the tenant under such circumstances. The case is not within the reason of the rule, and therefore is not governed by it. While this court has firmly adhered to the principle that the landlord is entitled to treat the tenant who holds over as lessee for another year, it is plain, from what was said in one of the most recent cases, that the rule was not considered an arbitrary one. On the contrary, it

is intimated that it was not so rigid that it could not properly be made to bend in exceptional and peculiar cases. *Haynes v. Aldrich*, *supra*. Where the holding over is wrongful or voluntary, and not unavoidable in the strictest sense, the rule must be permitted to have full application. But where the tenant, as in this case, is obliged to retain a room in the house for a short period of time in order to avoid the peril of exposing a member of his family to danger and death, it cannot properly be said that it is a holding over within the meaning of the law. Where a party acts under such a stress of circumstances, the act cannot be said to proceed from his own volition any more than if he had been detained in the house by the police under the direction of the health authorities.

* * * * *

It is important to note with more distinctness the wide difference between this case and *Haynes v. Aldrich*, *supra*. In that case the tenant violated one of the covenants of the lease by subletting the premises. The subtenant held over after the expiration of the term, and the tenant was sued for rent upon the principle that the holding over created a tenancy for another year. The tenant sought to excuse the holding over by the allegation that a distant relative of the subtenant, who was in possession, was detained in the house after the expiration of the term by sickness. This court held that, inasmuch as the subletting was in violation of the lease, and was a wrongful act on the part of the tenant, he could not be excused by a situation which was plainly the result of his own violation of a covenant of the lease. It is plain that the situation which it was claimed excused the tenant was of his own creation by putting another party in possession of the premises. The holding over in that case was very properly attributed to the wrongful act of the tenant in putting a stranger into possession of the demised premises.

When a tenant for a year actually holds over after the expiration of the term, the legal consequences which follow are well settled and understood. The landlord may, at his election, treat him either as a trespasser or a tenant for another year; but in any case the fact of holding over must be established. The landlord cannot treat him as a tenant, and collect the rent for another year, unless the facts are such as to justify him in

proceeding against him as a trespasser. An act which might ordinarily constitute a trespass when done or committed intentionally or voluntarily, cannot always be such when done or committed involuntarily. Moak, Underh. Torts, pp. 10, 15. The mere fact that the tenant, or some member of his family, is obliged to remain in a room in the house after the expiration of the demised term, may not necessarily amount to a trespass. Whether it does or not must depend upon circumstances. If he is detained there by the act of God, or of some superior legal power, or some unavoidable necessity, he is not ordinarily deemed to be a trespasser. A trespass presupposes some wrongful act towards the person or property of another. If the tenant in this case actually held over, the plaintiff could maintain ejectment against him; but, since his intention to remove on the day the lease expired is clear, and this purpose was defeated only by the dangerous illness of a member of his family, it would, I think, be difficult to say that he had such a possession of the house as would support an action of ejectment; and the same facts and circumstances that would protect him from such an action would also defeat the present claim, which is based upon the theory of an implied agreement to lease for another year. I do not mean to say that the facts stated in the answer would be a defense to an action by the landlord for damages based upon the breach of the covenant in the lease to surrender the demised premises at the expiration of the term. A duty or obligation imposed by law and one created by contract or covenant stand upon different grounds when the party seeks to be excused by the act of God, or unavoidable accident, or stress of circumstances. But in this case the right of the landlord to collect rent for the second year does not depend upon any express contract or covenant. It rests wholly upon the legal implication derived from the wrongful act of the tenant in holding over; and if that act was not in fact wrongful, but, under the circumstances, excusable, then there is no basis for any implied promise or agreement. I assume that if the tenant, or some member of his family, should die on the last day of the term, that no one would then contend that the continued occupation of the house for a few days during the funeral would amount to a wrongful holding over within the meaning of the law. Such an interpretation of a principle of the common law would

shock, not only our sense of justice, but every feeling of decency and humanity. The case before us differs from that only in degree. Both cases must be governed by a common principle. It is obvious that in the application of the rule now under consideration to the relation of landlord and tenant there must be a point beyond which we cannot go, and that point is reached when the alleged holding over cannot be attributed, directly or indirectly, to some fault on the part of the tenant. There may be cases in which the occupation of a room in a house after the lease has terminated will not amount to a trespass, or warrant the implication of a lease for another year. Since a party cannot, as a general rule, commit a trespass or make a contract without some effort of volition on his part, an act due to unavoidable accident, or resulting from some overruling necessity or stress of circumstances, can form no basis for imputing a wrong or inferring a contract. It is reasonable, therefore, to conclude from the facts and circumstances stated in the answer that the defendant was not a trespasser during the 15 days that his mother occupied the room in the house, and could not be removed without endangering her life, nor a tenant for another year. It follows, therefore, that the plaintiff was not entitled to recover rent from the time when the house was completely vacated.

It may be said that this conclusion is a departure from precedent, but it is not easy to see how it is. No case has been cited, and none has been found, where it was held that such a state of facts or such a situation as is disclosed by the answer amounted to a holding over by the tenant within the meaning of the rule that is invoked by the landlord to sustain this action. Legal rules may sometimes be pushed to a point where they accomplish the grossest injustice, and it then becomes the duty of the courts to limit their application to cases that are within their true scope and fair meaning. We go no further than to say that, upon the facts stated in the answer, if conceded or established, there was no holding over by the tenant within any fair or reasonable meaning of the rule which permits the landlord to continue the lease for another year. The judgment should be reversed, and a new trial granted, with costs to abide the event.

GRAY, J. (dissenting). This action was brought to recover of the defendants the rent of certain premises in the city of New York, which had been originally leased to them by the plaintiff for the term of one year from May 1, 1894. The defendants held over for some 15 days after the expiration of the term, and the rental moneys claimed in the action were for 7 months subsequent to May 1, 1895. The defense set up in the answer was, in substance, that, prior to the expiration of the term mentioned in the written lease, the defendants had notified the plaintiff that they would not take the premises for another year, and that they had hired another house, but that they had been prevented from yielding up possession "by the act of God in afflicting the mother of these defendants, who was a member of the family of the defendants, with a disease which * * * was so great that it would have endangered her life to have taken her from the room." The lease contained the usual agreement of the lessees to quit and surrender the premises at the expiration of the term. Upon the trial no evidence was given, the facts being then and there stipulated between the parties. The plaintiff admitted that the defendants notified him, in February, 1895, that on the 1st day of May, 1895, they would surrender the possession of the premises, and the defendants admitted that they remained over after the 1st of May without the assent of the plaintiff. The plaintiff admitted to be true the statement of the defendants that the mother of the defendants was ill on the 1st of May, 1895, and in the condition alleged in their answer. Upon these admissions of the parties, the trial judge directed a verdict for the plaintiff for the amount of rental moneys demanded under the terms of the written lease. To that direction the defendants excepted, and, the appellate division having affirmed the judgment entered against them, they further appeal to this court.

The question thus raised for our consideration is whether the rule of law, which has always controlled in such cases, is to be affected by the fact that the holding over by the defendants was by reason of the illness of their mother, as a member of the family, and therefore, in that sense, involuntary. The doctrine has been long a settled one in this state that a tenant who holds over his term, either is a trespasser or continues to be a tenant, at the sole election of the landlord, and that, in the latter case,

the legal implication is that he holds at the former rent. As this appeal should be disposed of upon authority, I shall advert to a few cases and to the opinions which have been expressed. The question was early discussed in what may be regarded as the leading case of *Conway v. Starkweather*, 1 Denio 113, where the tenant held over his term for the period of two weeks. Bronson, C. J., in his opinion, laid down the rule with considerable pertinency, and said that: "The tenant has no such election as that which belongs to the landlord. If he holds over, though for a very short period, without any unequivocal act at the time to give his holding the character of a trespass, he is not afterwards at liberty to deny that he is in as a tenant, if the landlord chooses to hold him to that relation. If the tenant may hold over for two weeks, and then say he is not a tenant, I see no reason why he may not give the same answer after holding over as many months or years. The plaintiff's counsel regards the holding over as only presumptive evidence of the continuance of the tenancy, which would have been sufficiently rebutted by the offered proof that the plaintiff, before his term ended, refused to keep the property another year, even at a reduced rent. But such are not my views. I do not think this a case for balancing presumptions, but one where the act of the plaintiff in holding over has given the defendants a legal right to treat him as tenant; and that it is not in his power to throw off that character, however onerous it may be." A number of years later, in the case of *Schuyler v. Smith*, 51 N. Y. 309, the defendants had held over for the period of three weeks after the expiration of the lease, and they opposed the claim of the plaintiff to hold them as tenants for the whole year, upon the ground that they had given him notice, before the expiration of the term, that they did not intend to keep the premises for another year, and with his knowledge, had made arrangements to occupy other premises. Judge Earl, relying on the rule of law as settled by *Conway v. Starkweather*, and since recognized by other cases, that, where a tenant holds over after the expiration of his term, the law will imply an agreement to hold for a year upon the terms of the prior lease, overruled their contention, and said: "The safe and just rule I believe to be the one established by authority,—that a tenant holds over the term at his peril, and the owner of the premises may treat

him as a trespasser or as a tenant for another year upon the terms of the prior lease, so far as applicable." Still later, in *Adams v. City of Cohoes*, 127 N. Y. 175, 28 N. E. 25, Judge Potter, delivering the opinion of this court in the Second division, discussed this question in the light of the authorities, and observed that: "So absolute is the implication, from holding over for a few days only, of a hiring for another year, that the tenant will not be excused from the payment of rent, even where he gave the landlord notice before the end of the term that he did not intend to hire for another year, and had hired other premises, which would be ready for his occupancy in a few days." Finally, we have the case of *Haynes v. Aldrich*, 133 N. Y. 287, 31 N. E. 94, where the holding over by the defendant was from the 1st to the 4th of May, and it was sought to be excused upon these facts, viz.: That the 1st day of May was a holiday; that on the 2d day of May there was difficulty in engaging trucks, and that a sick boarder could not be removed with safety until the fourth day. Judge Finch discusses, in his opinion, the efficacy of such a defense somewhat elaborately, and, referring to the rule as well settled by authority that where there is a holding over by the tenant the law will imply an agreement to hold for a year upon the terms of the prior lease, makes the following observations upon the argument of the appellant: "The appellant does not deny the rule, but seeks to qualify it so as to mean that it is only when the tenant holds over voluntarily, and for his own convenience, that the landlord's right arises, and that it does not so arise when the tenant holds over involuntarily, not for his own convenience, but because he cannot help it. I am averse to any such qualification. It would introduce an uncertainty into a rule whose chief value lies in its certainty. The consequent confusion would be very great. Excuses would always be forthcoming, and their sufficiency be subject to the doubtful conclusions of a jury, and no lessor would ever know when he could safely promise possession to a new tenant." Again, he says that: "If the rule in this case seems to involve a hardship, that is sometimes true of every general rule, however just and wise; but does not justify its abrogation. To sustain this defense would open the door to a destruction of the settled doctrine and tend to involve the rights of both lessor and lessee in uncertainty and confusion."

This is pretty strong language; but the appellants, nevertheless, seek to distinguish the case as an authority, because there it was a subtenant whose illness prevented the surrender of possession, and the question was reserved whether there might not be an inevitable delay, in no manner the fault of the tenant, which would serve as a valid excuse. It is true that there is that much of a distinction between the two cases, but I think the distinction to be somewhat shadowy, so far as the excuse for not yielding up the premises promptly is concerned, and I agree with the reasoning of the opinion at the appellate division in the present case, that "no such qualification should be, or could safely be, imported into the absolute rule of law. It would make the landlord, rather than the tenant, suffer by reason of a misfortune to the tenant, which he, and not the landlord, should bear the burden of." It seems to me that Judge Finch, in *Haynes v. Aldrich*, has given a convincing reason against importing any qualification into a well-settled rule of law, by which its application might be rendered uncertain according to the facts pleaded by the tenant. Since the leading case of *Conway v. Starkweather*, I am not aware of any qualification of the rule having been admitted, and I think that, if a case arises in which it operates harshly, the misfortune is one which, for the sake of the stability of the rule, should be borne by the tenant, rather than by the landlord. The underlying principle is that the rights of the parties are determined by their engagements, and effect must be given to the contract. The doctrine, as settled by the decisions of the courts of this state obtains in many other jurisdictions. *Cloth Co. v. Gardner*, 99 Ill. 151; *Moore v. Beasley*, 3 Ohio 294; *Vrooman v. McKaig*, 4 Md. 450; *Bacon v. Brown*, 9 Conn. 334; *Hemphill v. Flynn*, 2 Pa. St. 144; *Wolffe v. Wolff*, 69 Ala. 549.

This is in no sense to be considered like a case where performance of a condition is prevented by the act of God, nor one where the discharge of an obligation was not fully intended by the parties. It is simply that of a contract which, by its terms, gave the occupancy and use of the premises of the owner for a specified term, and under specified conditions, which fixed the rent to be paid, and which contained the covenant of the lessee to quit and surrender the premises at the expiration of the demised term. The distinction is well settled between an obli-

gation or duty imposed by law and that created by covenant of the party. In the former case, if the party is disabled from performing without any default of his own, the law will excuse him. Illustrations of this are where waste to a tenement is caused by its destruction by tempest or by enemies, or where the contract is for personal services, and the condition of continued existence is raised by implication. But where the party creates a duty by his own contract he is bound to make it good, notwithstanding any accident by inevitable necessity; because he might have provided against it by his contract. 2 Saund. 422, note 2; 21 Pick 417, 441; 47 N. Y. 62, 64.

Of course, there was nothing to submit to the jury, and the defendants did not request a submission. All the facts for a judgment were stipulated when the case came on for trial, and they presented the one question for the court whether, in law, they established the plaintiff's right to the rent demanded. I think the judgment should be affirmed, with costs.

O'BRIEN and MARTIN, JJ., read for reversal, etc. PARKER, C. J., and HAIGHT, J., concur. GRAY, J., reads for affirmance, and BARTLETT and VANN, JJ., concur.

Judgment reversed.

CHAPTER X.

TERMINATION OF TENANCY.

Tenancy from Year to Year. Notice to Quit.

HUNTER v. FROST.

47 Minn. 1, 49 N. W. 327. 1891.

Appeal from district court, Ramsey county: Egan, judge.

MITCHELL, J. The plaintiff leased to defendant a tenement for the term of 13 months from April 1, 1888, for an agreed rent of \$540 per annum, payable in equal installments of \$45, in advance, on the first day of each month. The defendant entered and occupied the premises during the term, and after its expiration held over and continued in possession, and paid rent to the plaintiff, in accordance with the terms of the lease, up to and including the month of November, 1889. Several days prior to October 30, 1889, the defendant served upon plaintiff written notice that he would vacate the premises on November 30th next ensuing. In pursuance of this notice he vacated them, and has not since that time occupied them or paid rent. This action is to recover rent from December 1, 1889, to May 1, 1890. It is not questioned but that at common law the defendant, by holding over after the end of the term without any new agreement, and paying rent according to the terms of the prior tenancy, which was accepted by the plaintiff, became a tenant from year to year, and that this tenancy could not be terminated by either party, except upon due notice (at common law, six months) terminating at the end of the first or any subsequent year (May 1st). But defendant's contention is that tenancies from year to year have been abolished by the statutes of this state, and converted into tenancies at will, which may be terminated at any time by either party by giving the length of notice provided by Gen. St. 1878, c. 75, § 40, which, in this case, would be one month, the rent reserved being payable

monthly. While tenancies from year to year are the creation of judicial decisions, based upon principles of policy and justice, out of what were anciently tenancies strictly at will, terminable at any time by either party without notice, yet such tenancies had become so well established and so fully recognized in the common law that it would naturally be supposed that, if it had been intended to convert them into mere tenancies at will, it would have been done by express and clear language, and not left to mere inference or implication. We think we are safe in saying that, although our statutes bearing upon the subject have always been the same as now, it has never been the understanding of the bar of the state that they had introduced any such radical change in the law as that now contended for. Evidently this court, in considering the cases of *Gardner v. Commissioners*, 21 Minn. 38, and *Dayton v. Craik*, 26 Minn. 134, 1 N. W. Rep. 813, assumed that tenancies from year to year still existed in this state. It was squarely so decided in *Smith v. Bell*, 44 Minn. 524, 47 N. W. Rep. 263, although the question was not very fully argued in that case, and we would not feel bound to follow it if fully convinced that it was wrong.

Counsel for defendant does not claim that there is any express provision of statute abolishing such tenancies, but he relies on certain provisions which he claims effect that result by implication. The first is Gen. St. c. 45, § 1, dividing estates in land into estates of inheritance, estates for life, estates for years, estates at will and by sufferance; the argument being that, as estates from year to year are not named, therefore they are impliedly abolished. The next is Gen. St. c. 75, § 40, which provides that all estates at will may be determined by either party by three months' notice in writing for that purpose given to the other party, and, when the rent reserved is payable at periods of less than three months, the term of such notice shall be sufficient if it is equal to the interval between the times of payment. It is argued that by this the legislature intended to provide for the termination of all estates which did not terminate themselves without notice, and made provision for all the estates, which it recognized, which did not terminate themselves, to-wit., estates at will. Reference is also made to Gen. St. c. 84, § 11, governing summary proceedings

for the recovery of possession by a landlord. It is said that this was evidently intended to give a landlord a summary remedy whenever the relation of landlord exists, but, as the statute only refers to two classes of cases in which the remedy may be employed, when the tenant is not in arrears of rent, to-wit, when the tenant holds over after the termination of the time for which the premises were demised, and where a tenant at will holds over after the determination of any such estate by notice to quit, therefore, if tenancies from year to year still exist, the tenant in such cases could only be evicted by an action of ejectment. It seems to us that counsel has been led into error by failing to duly consider the state of the common law when the statutes were passed, and by assuming that, when they speak of tenancies at will, they refer exclusively to tenancies strictly at will; that is, those which, but for the statute in reference to notices to quit, would have been terminable at any time by either party without notice. It was determined very anciently by the common law, upon principles of justice and policy, that estates at will were equally at the will of both parties, and neither of them was permitted to exercise his will in a wanton manner, and contrary to equity and good faith, but that they could only be terminated by notice for a longer or shorter period, depending usually upon the nature of the original demise. At first there was no other rule but that the notice should be a reasonable one. Because of the uncertainty of this rule, the courts early adopted, as far as possible, some fixed period as being reasonable. In those tenancies which, from the nature of the original demise, they construed to be tenancies from year to year, the courts adopted six months as a reasonable notice, holding that such tenancies could only be determined by a notice of at least six months, terminating at the expiration of the first or any succeeding year. And in those cases which did not come within the class of tenancies from year to year, because by implication for some definite period less than a year, the rule was generally adopted that the time of notice should be governed by the length of time specified as the interval between the times of payment of rent, and should be equal to one of these intervals, and must end at the expiration thereof. The result was that at common law estates at will, in the strict sense, became almost extinguished at a very early date, under the

operation of judicial decisions. Indeed, it would have been difficult to conceive of an instance of such a tenancy, except where created by the express contract of the parties to that effect. But they still remained substantially tenancies at will, except that such will could not be determined by either party without due notice to quit. The enumeration or classification of estates adopted by our statutes is but declaratory of that found in all writers on the common law, even after the doctrine of tenancies from year to year had been fully established by the decisions of the court. Estates in land, less than freehold, have always been classified as of three sorts: (1) Estates for years; (2) estates at will; (3) estates by sufferance. 2 Bl. Comm. 139. This classification was first incorporated in statutory form in the old Revised Statutes of New York, and from them borrowed successively by Michigan and Wisconsin, and perhaps other states; but in none of them was it ever held, or even suggested, that the statute affected or in any way changed the common law as to tenancies from year to year. Did the statutory enumeration necessarily exclude tenancies from year to year, there would be much force in defendant's argument. But, so far from this being the case, they may be included in either estates for years or estates at will, or both, as they possess many of the qualities of each. A tenancy from year to year, though indeterminate as to duration until notice given, has most of the qualities and incidents of a term for years, and, when notice has been given, the term is as much fixed for a definite period as any term for years. A tenant from year to year has a lease for a year certain, with a growing interest during every year thereafter, springing out of the original contract, and parcel of it. Such an estate is not determined by the death of either lessor or lessee; it is assignable and demisable, and may be pleaded as a term. But, although it has many of the qualities of a term for years, yet it is, as already remarked, substantially a tenancy at will except that such will cannot be determined by either party without due notice to quit, terminating at the end of a year. 1 Woodf., Landl. & Ten. 219. For purposes of notice to quit, it is a general tenancy at will. 2 Tayl., Landl. & Ten., § 467, and cases cited. And for purposes of general classification it is treated as a species of tenancy at will, and as properly so as are those tenancies which by implication are held to be for

some period less than a year, as from quarter to quarter, or from month to month, where notice to quit is also necessary in order to terminate them; the only difference being as to the length of the notice and the time it should terminate. Notwithstanding what was decided in *Smith v. Bell*, supra, we have come to the conclusion, upon fuller examination, that the provisions of chapter 75, § 40, in relation to notices to quit, were intended to apply to all estates which do not terminate themselves without notice, and that for the purposes of such notices a tenancy from year to year is a tenancy at will. In some of the cases cited by plaintiff it was held, as in *Smith v. Bell*, that similar statutes apply only to the notice required to terminate a tenancy at will, and have no application to a tenancy from year to year. In one of these cases it is said that the purpose of the statute was to give tenants at will the right to the notice therein specified before they could be dispossessed, whereas, before such enactment, they were not entitled to any notice whatever; in other words, that the statute was to give the tenant the right to notice in cases which, but for the statute, would have been tenancies strictly at will. It seems to us that, in placing this construction upon such statutes, the courts have entirely overlooked the fact that tenancies strictly at will had already practically ceased to exist, except where the parties had expressly contracted that the tenancy might be terminated at any time without notice; and as in such cases the contract of the parties, and not the statute, would control, the result would be that such a construction would render the statute meaningless. We have therefore reached the conclusion that the description of estate commonly known as a "tenancy from year to year" is comprehended in the term "estates at will," as used in chapter 75, § 40. But this section has reference only to the length of notice, and does not assume to otherwise change or affect the nature of the tenancy, or the existing rules of law as to when the notice should terminate. For example, where, by implication, the tenancy is from quarter to quarter, or from month to month, the rent being payable quarterly or monthly, the notice must still terminate with the quarter or month; and, where the tenancy is from year to year, the notice must terminate with a year, although the length of it may now be shorter than six

months, as formerly required at common law. Consequently, while the notice given by defendant in this case was sufficient as to length, yet it was wholly ineffectual, because not terminating at the end of a year. There is nothing in the point that there can be no such thing as a tenancy from year to year in this state because of the statute of frauds. Gen. St., c. 41, § 10. The courts have uniformly held that tenancies from year to year were not affected by such a statute. The cases from Massachusetts and Maine are not in point, because expressly placed upon their statutes providing that an estate or interest in land, created without an instrument in writing, "shall have the force and effect of an estate at will only."

Judgment affirmed.

PART VI

LEADING ILLUSTRATIVE CASES

TAXATION

CHAPTER I.

THE POWER OF TAXATION.

Distinction Between Direct Taxes and Excises in the Federal Constitution.

POLLOCK v. FARMERS' LOAN AND TRUST CO.

158 U. S. 601. 1895.

[This was a bill by a stockholder in the defendant corporation to restrain it from paying to the United States a tax of two per cent on its net profits, including the income from real estate and municipal bonds, alleging that the act of Congress establishing such tax was unconstitutional.]

On April 8, 1895, the court, one justice being absent decided:
“A tax on the rents or income of real estate is a direct tax, within the meaning of that term as used in the Constitution of the United States.

“A tax upon incomes derived from the interest of bonds issued by a municipal corporation is a tax upon the power of the State and its instrumentalities to borrow money, and is consequently repugnant to the Constitution of the United States.

“Upon each of the other questions argued at bar, to wit:
1. Whether the void provision as to rent and income from real estate invalidates the whole act? 2. Whether as to the income from personal property as such, the act is unconstitutional, as laying direct taxes? 3. Whether any part of the tax, if not considered as a direct tax, is invalid for want of uniformity on

either of the grounds suggested?—the Justices who heard the argument are equally divided, and, therefore, no opinion is expressed.” (157 U. S. 429.)

A rehearing was granted.

The cases were re-argued before the full bench, and on May 20, 1895, the following opinion was rendered :

FULLER, C. J., delivered the opinion of the court.

* * * As heretofore stated, the Constitution divided federal taxation into two great classes, the class of direct taxes and the class of duties, imposts, and excises, and prescribed two rules which qualified the grant of power as to each class.

The power to lay direct taxes, apportioned among the several states in proportion to their representation in the popular branch of Congress, a representation based on population as ascertained by the census, was plenary and absolute, but to lay direct taxes without apportionment was forbidden. The power to lay duties, imposts, and excises was subject to the qualification that the imposition must be uniform throughout the United States.

Our previous decision was confined to the consideration of the validity of the tax on the income from real estate and on the income from municipal bonds. The question thus limited, was whether such taxation was direct or not, in the meaning of the Constitution, and the court went no further as to the tax on the incomes from real estate than to hold that it fell within the same class as the source whence the income was derived, that is, that a tax upon the realty and a tax upon the receipts therefrom were alike direct; while as to the income from municipal bonds, that could not be taxed, because of want of power to tax the source, and no reference was made to the nature of the tax being direct or indirect.

We are now permitted to broaden the field of inquiry and determine to which of the two great classes a tax upon a person's entire income, whether derived from rents or products or otherwise, of real estate, or from bonds, stocks or other forms of personal property, belongs; and we are unable to conclude that the enforced subtraction from the yield of all the owner's real or personal property, in the manner prescribed, is so different from a tax upon the property itself that it is not a direct but an indirect tax in the meaning of the Constitution.

The words of the Constitution are to be taken in their obvious sense and to have a reasonable construction. In *Gibbons v. Ogden*, Chief Justice Marshall, with his usual felicity, said:

“As men, whose intentions require no concealment, generally employ the words which most directly and aptly express the ideas they intend to convey, the enlightened patriots who framed our Constitution and the people who adopted it must be understood to have employed words in their natural sense and to have intended what they have said.” 9 Wheat. 1, 188. * * *

We know of no reason for holding otherwise than that the words “direct taxes” on the one hand, and “duties, imposts, and excises” on the other, were used in the Constitution in their natural and obvious sense, nor, in arriving at what those terms embrace, do we perceive any ground for enlarging them beyond, or narrowing them within, their natural and obvious import at the time the Constitution was framed and ratified. * * *

Whatever the speculative views of political economists or revenue reformers may be, can it be properly held that the Constitution, taken in its plain and obvious sense, and with due regard to the circumstances attending the formation of the government, authorizes a general unapportioned tax on the products of the farm and the rents of real estate, although imposed merely because of ownership and with no possible means of escape from payment, as belonging to a totally different class from that which includes the property from whence the income proceeds?

There can be only one answer, unless the constitutional restriction is to be treated as utterly illusory and futile, and the object of its framers defeated. We find it impossible to hold that a fundamental requisition, deemed so important as to be enforced by two provisions, one affirmative and one negative, can be refined away by forced distinctions between that which gives value to property and the property itself.

Nor can we conceive any ground why the same reasoning does not apply to capital in personalty held for the purpose of income or ordinarily yielding income, and to the income therefrom. All the real estate of the country, and all its invested personal property, are open to the direct operation of the taxing power if an apportionment be made according to the Constitution. The Constitution does not say that no direct tax shall be laid by

apportionment on any other property than land; on the contrary, it forbids all unapportioned direct taxes; and we know of no warrant for excepting personal property from the exercise of the power, or any reason why an apportioned direct tax cannot be laid and assessed, as Mr. Gallatin said in his report when Secretary of the Treasury in 1812, "upon the same objects of taxation on which the direct taxes levied under the authority of the State are laid and assessed." * * *

Nor are we impressed with the argument that because in the four instances in which the power of direct taxation has been exercised, Congress did not see fit, for reasons of expediency, to levy a tax upon personalty, this amounts to such a practical construction of the Constitution that the power did not exist, that we must regard ourselves bound by it. We should regret to be compelled to hold the powers of the general government thus restricted, and certainly cannot accede to the idea that the Constitution has become weakened by a particular course of inaction under it.

The stress of the argument is thrown, however, on the assertion that an income tax is not a property tax at all; that it is not a real estate tax, nor a crop tax, nor a bond tax; that it is an assessment upon the taxpayer on account of his money-spending power as shown by his revenue for the year preceding the assessment; that rents received, crops harvested, interest collected, have lost all connection with their origin, and although once not taxable have become transmuted in their new form into taxable subject-matter; in other words, that income is taxable irrespective of the source whence it is derived.

This was the view entertained by Mr. Pitt as expressed in his celebrated speech on introducing his income-tax law of 1799, and he did not hesitate to carry it to its logical conclusion. The English loan acts provided that the public dividends should be paid "free of all taxes and charges whatsoever;" but Mr. Pitt successfully contended that the dividends for the purposes of the income tax were to be considered simply in relation to the recipient as so much income, and that the holder had no reason to complain. And this, said Mr. Gladstone fifty-five years after, was the rational construction of the pledge. *Financial Statements*, 32. * * *

We have unanimously held in this case that, so far as this law

operates on the receipts from municipal bonds, it cannot be sustained, because it is a tax on the power of the states, and on their instrumentalities to borrow money, and consequently repugnant to the Constitution. But if, as contended, the interest when received has become merely money in the recipient's pocket, and taxable as such without reference to the source from which it came, the question is immaterial whether it should have been originally taxed at all or not. This was admitted by the Attorney General with characteristic candor; and it follows that, if the revenue derived from municipal bonds cannot be taxed because the source cannot be, the same rule applies to revenue from any other source not subject to the tax; and the lack of power to levy any but an apportioned tax on real estate and personal property equally exists as to the revenue therefrom.

Admitting that this act taxes the income of property irrespective of its source, still we cannot doubt that such a tax is necessarily a direct tax in the meaning of the Constitution. * * *

Being direct, and therefore to be laid by apportionment, is there any real difficulty in doing so? Cannot Congress, if the necessity exist of raising thirty, forty, or any other number of million dollars for the support of the government, in addition to the revenue from duties, imposts, and excises, apportion the quota of each state upon the basis of the census, and thus advise it of the payment which must be made, and proceed to assess that amount on all the real or personal property and the income of all persons in the state, and collect the same if the state does not in the meantime assume and pay its quota and collect the amount according to its own system and in its own way? Cannot Congress do this as respects either or all these subjects of taxation, and deal with each in such manner as might be deemed expedient, as indeed was done in the act of July 14, 1798 (C., 75, 1 Stat. 597)? Inconveniences might possibly attend the levy of an income tax, notwithstanding the listing of receipts, when adjusted, furnishes its own valuation; but that it is apportionable is hardly denied, although it is asserted that it would operate so unequally as to be undesirable. * * *

The power to tax real and personal property and the income from both, there being an apportionment, is conceded; that such a tax is a direct tax in the meaning of the Constitution has not been, and, in our judgment, cannot be successfully denied; and

yet we are thus invited to hesitate in the enforcement of the mandate of the Constitution which prohibits Congress from laying a direct tax on the revenue from property of the citizen without regard to state lines, and in such manner that the states cannot intervene by payment in regulation of their own resources, lest a government of delegated powers should be found to be, not less powerful, but less absolute, than the imagination of the advocate had supposed.

We are not here concerned with the question whether an income tax be or be not desirable, nor whether such a tax would enable the government to diminish taxes on consumption and duties on imports and to enter upon what may be believed to be a reform of its fiscal and commercial system. Questions of that character belong to the controversies of political parties, and cannot be settled by judicial decision. In these cases our province is to determine whether this income tax on the revenue from property does or does not belong to the class of direct taxes. If it does, it is, being unapportioned, in violation of the Constitution, and we must so declare. * * *

We have considered the act only in respect to the tax on income derived from real estate, and from invested personal property, and have not commented on so much of it as bears on gains or profits from business, privileges, or employments, in view of the instances in which taxation on business, privileges, or employments has assumed the guise of an excise tax and been sustained as such.

Being of opinion that much of the sections of this law as lays a tax on income from real and personal property is invalid, we are brought to the question of the effect of that conclusion upon these sections as a whole. * * *

Our conclusions may, therefore, be summed up as follows:

First. We adhere to the opinion already announced, that, taxes on real estate being indisputably direct taxes, taxes on the rents or incomes of real estate are equally direct taxes.

Second. We are of opinion that taxes on personal property, or on the income of personal property, are likewise direct taxes.

Third. The tax imposed by §§ 27-37, inclusive, of the Act of 1894, so far as it falls on the income of real estate and of personal property, being a direct tax within the meaning of the Constitution, and, therefore, unconstitutional and void because

not apportioned according to representation, all those sections, constituting one entire scheme of taxation, are necessarily invalid.

The decrees hereinbefore entered in this court will be vacated; the decrees below will be reversed, and the cases remanded, with instructions to grant the relief prayed.

HARLAN, BROWN, JACKSON and WHITE, JJ., delivered dissenting opinions.

CHAPTER II.

TAXATION BY THE UNITED STATES AND OF UNITED STATES PROPERTY.

Taxation of the Property and Instrumentalities of the United States.

MCCULLOCH v. MARYLAND.

4 Wheaton 316 (U. S.). 1819.

[This was a suit in the courts of Maryland, by that state against plaintiff in error, as cashier of the Baltimore branch of the Bank of the United States, to recover taxes claimed to be due under a statute of Maryland. Defendant questioned the validity of such statute, and from the judgment against him, brought the case to this court by writ of error.]

MARSHALL, C. J., delivered the opinion of the court.

In the case now to be determined, the defendant, a sovereign state, denies the obligation of a law enacted by the legislature of the Union; and the plaintiff, on his part, contests the validity of an act which has been passed by the legislature of that state. The Constitution of our country, in its most interesting and vital parts, is to be considered; the conflicting powers of the government of the Union and of its members, as marked in that Constitution, are to be discussed; and an opinion given, which may essentially influence the great operations of the government. No tribunal can approach such a question without a deep sense of its importance, and of the awful responsibility involved in its decision. But it must be decided peacefully, or remain a source of hostile legislation, perhaps of hostility of a still more serious nature; and if it is to be so decided, by this tribunal alone can the decision be made. On the Supreme Court of the United States has the Constitution of our country devolved this important duty. * * *

It being the opinion of the court that the act incorporating the bank is constitutional; and that the power of establishing a branch in the state of Maryland might be properly exercised by the bank itself, we proceed to inquire: * * *

2. Whether the state of Maryland may, without violating the Constitution, tax that branch? That the power of taxation is one of vital importance; that it is retained by the States; that it is not abridged by the grant of a similar power to the government of the Union; that it is to be concurrently exercised by the two governments: are truths which have never been denied. But, such is the paramount character of the Constitution, that its capacity to withdraw any subject from the action of even this power, is admitted. The states are expressly forbidden to lay any duties on imports or exports, except what may be absolutely necessary for executing their inspection laws. If the obligation of this prohibition must be conceded—if it may restrain a state from the exercise of its taxing power on imports and exports; the same paramount character would seem to restrain, as it certainly may restrain, a state from such other exercise of this power as is in its nature incompatible with, and repugnant to, the constitutional laws of the Union. A law, absolutely repugnant to another, as entirely repeals that other as if express terms of repeal were used.

On this ground the counsel for the bank place its claim to be exempted from the power of a state to tax its operations. There is no express provision for the case, but the claim has been sustained on a principle which so entirely pervades the Constitution, is so intermixed with the materials which compose it, so interwoven with its web, so blended with its texture, as to be incapable of being separated from it, without rending it into shreds.

This great principle is, that the Constitution and the laws made in pursuance thereof are supreme; that they control the constitution and laws of the respective states, and cannot be controlled by them. From this, which may be almost termed an axiom, other propositions are deduced as corollaries, on the truth or error of which, and on their application to this case, the cause has been supposed to depend. These are: 1. That a power to create implies a power to preserve. 2. That a power to destroy, if wielded by a different hand, is hostile to, and incompatible with, these powers to create and preserve. 3. That where this repugnancy exists, that authority which is supreme must control, not yield to that over which it is supreme.

These propositions, as abstract truths, would, perhaps, never be controverted. Their application to this case, however, has

been denied; and, both in maintaining the affirmative and the negative, a splendor of eloquence, and strength of argument, seldom, if ever surpassed, have been displayed.

The power of Congress to create, and of course to continue, the bank, was the subject of the preceding part of this opinion; and is no longer to be considered as questionable.

That the power of taxing it by the states may be exercised so as to destroy it, is too obvious to be denied. * * *

The argument on the part of the state of Maryland, is, not that the states may directly resist a law of Congress, but that they may exercise their acknowledged powers upon it, and that the Constitution leaves them this right in the confidence that they will not abuse it. * * *

The sovereignty of a state extends to everything which exists by its own authority, or is introduced by its permission; but does it extend to those means which are employed by Congress to carry into execution powers conferred on that body by the people of the United States? We think it demonstrable that it does not. Those powers are not given by the people of a single state. They are given by the people of the United States, to a government whose laws, made in pursuance of the Constitution, are declared to be supreme. Consequently, the people of a single state cannot confer a sovereignty which will extend over them. * * *

We find, then, on just theory, a total failure of this original right to tax the means employed by the government of the Union, for the execution of its powers. The right never existed, and the question whether it has been surrendered, cannot arise.

But, waiving this theory for the present, let us resume the inquiry, whether this power can be exercised by the respective states, consistently with fair construction of the Constitution?

That the power to tax involves the power to destroy; that the power to destroy may defeat and render useless the power to create; that there is a plain repugnance, in conferring on one government a power to control the constitutional measures of another, which other, with respect to those very measures, is declared to be supreme over that which exerts the control, are propositions not to be denied. But all inconsistencies are to be reconciled by the magic of the word confidence. Taxation, it is said, does not necessarily and unavoidably destroy. To carry it to the excess of destruction would be an abuse, to presume

which, would banish that confidence which is essential to all government.

But is this a case of confidence? Would the people of any one state trust those of another with a power to control the most insignificant operations of their state government? We know they would not. Why, then, should we suppose that the people of any one state should be willing to trust those of another with a power to control the operations of a government to which they have confided their most important and most valuable interests? In the legislature of the Union alone, are all represented. The legislature of the Union alone, therefore, can be trusted by the people with the power of controlling measures which concern all, in the confidence that it will not be abused. This, then, is not a case of confidence, and we must consider it as it really is. * * *

If the states may tax one instrument, employed by the government in the execution of its powers, they may tax any and every other instrument. They may tax the mail; they may tax the mint; they may tax patent rights; they may tax the papers of the custom house; they may tax judicial process; they may tax all the means employed by the government, to an excess which would defeat all the ends of government. This was not intended by the American people. They did not design to make their government dependent on the states. * * *

The court has bestowed on this subject its most deliberate consideration. The result is a conviction that the states have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government. This is, we think, the unavoidable consequence of that supremacy which the Constitution has declared.

We are unanimously of opinion, that the law passed by the legislature of Maryland, imposing a tax on the Bank of the United States, is unconstitutional and void.

This opinion does not deprive the states of any resources which they originally possessed. It does not extend to a tax paid by the real property of the bank, in common with the other real property within the state, nor to a tax imposed on the interest which the citizens of Maryland may hold in this institution, in common with other property of the same description throughout the state. But this is a tax on the operations of the bank, and is,

consequently, a tax on the operation of an instrument employed by the government of the Union to carry its powers into execution. Such a tax must be unconstitutional.

JUDGMENT. This case came on to be heard on the transcript of the record of the court of appeals of the state of Maryland, and was argued by counsel. On consideration whereof, it is the opinion of this court that the act of the legislature of Maryland is contrary to the Constitution of the United States, and void.
* * * The judgment of the Supreme Court of Maryland is therefore
Reversed.

CHAPTER III.

THE TAXATION OF FOREIGN AND INTERSTATE COMMERCE.

Duties on Imports—The Taxation of Interstate Commerce.

BROWN v. MARYLAND.

12 Wheaton 419 (U. S.). 1827.

MARSHALL, C. J., delivered the opinion of the court.

This is a writ of error to a judgment rendered in the Court of Appeals of Maryland, affirming a judgment of the City Court of Baltimore, on an indictment found in that court against the plaintiffs in error, for violating an act of the legislature of Maryland. The indictment was founded on the second section of that act, which is in these words: "And be it enacted that all importers of foreign articles or commodities, of dry goods, wares, or merchandise, by bale or package, or of wine, rum, brandy, whiskey, and other distilled spirituous liquors, etc., and other persons selling the same by wholesale, bale or package, hogshead, barrel, or tierce, shall, before they are authorized to sell, take out a license, as by the original act is directed, for which they shall pay fifty dollars; and in case of neglect or refusal to take out such license, shall be subject to the same penalties and forfeitures as are prescribed by the original act to which this is a supplement." The indictment charges the plaintiffs in error with having imported and sold one package of foreign dry goods without having license to do so. A judgment was rendered against them, on demurrer, for the penalty which the act prescribes for the offense; and that judgment is now before this court.

The cause depends entirely on the question whether the legislature of a state can constitutionally require the importer of foreign articles to take out a license from the state, before he shall be permitted to sell a bale or package so imported.

It has been truly said that the presumption is in favor of every legislative act, and that the whole burden of proof lies on him who denies its constitutionality. The plaintiffs in error take the burden upon themselves, and insist that the act under

consideration is repugnant to two provisions in the Constitution of the United States.

1. To that which declares that "no state shall, without the consent of Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws."

2. To that which declares that Congress shall have power "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes."

1. The first inquiry is into the extent of the prohibition upon states "to lay any imposts or duties on imports or exports." The counsel for the state of Maryland would confine this prohibition to laws imposing duties on the act of importation or exportation. The counsel for the plaintiffs in error give them a much wider scope.

In performing the delicate and important duty of construing clauses in the Constitution of our country, which involve conflicting powers of the government of the Union, and of the respective states, it is proper to take a view of the literal meaning of the words to be expounded, of their connection with other words, and of the general objects to be accomplished by the prohibitory clause, or by the grant of power.

What, then, is the meaning of the words, "imposts or duties on imports or exports"?

An impost, or duty on imports, is a custom or a tax levied on articles brought into a country, and is most usually secured before the importer is allowed to exercise his rights of ownership over them, because evasions of the law can be prevented more certainly by executing it while the articles are in its custody. It would not, however, be less an impost or duty on the articles if it were to be levied on them after they were landed. The policy and consequent practice of levying or securing the duty before or on entering the port, does not limit the power to that state of things, nor, consequently, the prohibition, unless the true meaning of the clause so confines it. What, then, are "imports"? The lexicons inform us they are "things imported." If we appeal to usage for the meaning of the word, we shall receive the same answer. They are the articles themselves which are brought into the country. "A duty on imports," then, is not merely a duty on the act of importation, but is a

duty on the thing imported. It is not, taken in its literal sense, confined to a duty levied while the article is entering the country, but extends to a duty levied after it has entered the country. The succeeding words of the sentence, which limit the prohibition, show the extent in which it was understood. The limitation is "except what may be absolutely necessary for executing its inspection laws." Now, the inspection laws, so far as they act upon articles for exportation, are generally executed on land, before the article is put on board the vessel; so far as they act upon importations, they are generally executed upon articles which are landed. The tax or duty of inspection, then, is a tax which is frequently, if not always, paid for service performed on land, while the article is in the bosom of the country. Yet this tax is an exception to the prohibition on the states to lay duties on imports or exports. The exception was made because the tax would otherwise have been within the prohibition.

If it be a rule of interpretation to which all assent, that the exception of a particular thing from general words, proves that, in the opinion of the lawgiver, the thing excepted would be within the general clause had the exception not been made, we know no reason why this general rule should not be as applicable to the Constitution as to other instruments. If it be applicable, then this exception in favor of duties for the support of inspection laws, goes far in proving that the framers of the Constitution classed taxes of a similar character with those imposed for the purposes of inspection, with duties on imports and exports, and supposed them to be prohibited.

If we quit this narrow view of the object, and, passing from the literal interpretation of the words, look to the objects of the prohibition, we find no reason for withdrawing the act under consideration from its operation.

From the vast inequality between the different states of the confederacy, as to commercial advantages, few subjects were viewed with deeper interest, or excited more irritation, than the manner in which the several states exercised, or seemed disposed to exercise, the power of laying duties on imports. From motives which were deemed sufficient by the statesmen of that day, the general power of taxation, indispensably necessary as it was, and jealous as the states were of any encroachment on it, was so far abridged as to forbid them to touch imports or exports, with the

single exception which has been noticed. Why are they restrained from imposing these duties? Plainly, because, in the general opinion, the interest of all would be best promoted by placing that whole subject under the control of Congress. * * *

The counsel for the state of Maryland insist, with great reason, that if the words of the prohibition be taken in their utmost latitude, they will abridge the power of taxation, which all admit to be essential to the states, to an extent which has never yet been suspected, and will deprive them of resources which are necessary to supply revenue, and which they have heretofore been admitted to possess. These words must, therefore, be construed with some limitation; and if this be admitted, they insist, that entering the country is the point of time when the prohibition ceases, and the power of the state to tax commences.

It may be conceded that the words of the prohibition ought not to be pressed to their utmost extent; that in our complex system, the object of the powers conferred on the government of the Union, and the nature of the often conflicting powers which remain in the states, must always be taken into view, and may aid in expounding the words of any particular clause. But, while we admit that sound principles of construction ought to restrain all courts from carrying the words of the prohibition beyond the object the Constitution is intended to secure; that there must be a point of time when the prohibition ceases, and the power of the state to tax commences; we cannot admit that this point of time is the instant that the articles enter the country. It is, we think, obvious, that this construction would defeat the prohibition.

The constitutional prohibition on the states to lay a duty on imports, a prohibition which a vast majority of them must feel an interest in preserving, may certainly come in conflict with their acknowledged power to tax persons and property within their territory. * * *

The counsel for the plaintiffs in error contend that the importer purchases, by payment of the duty to the United States, a right to dispose of his merchandise, as well as to bring it into the country; and certainly the argument is supported by strong reason, as well as by the practice of nations, including our own. The object of importation is sale; it constitutes the motive for paying the duties; and if the United States possess the power of

conferring the right to sell, as the consideration for which the duty is paid, every principle of fair dealing requires that they should be understood to confer it. The practice of the most commercial nations conforms to this idea. Duties, according to that practice, are charged on those articles only which are intended for sale or consumption in the country. Thus, sea stores, goods imported and reexported in the same vessel, goods landed and carried overland for the purpose of being reexported from some other port, goods forced in by stress of weather, and landed, but not for sale, are exempted from the payment of duties. The whole course of legislation on the subject shows that, in the opinion of the legislature, the right to sell is connected with the payment of duties. * * *

This indictment is against the importer, for selling a package of dry goods in the form in which it was imported, without a license. This state of things is changed if he sells them or otherwise mixes them with the general property of the state, by breaking up his packages, and travelling with them as an itinerant peddler. In the first case, the tax intercepts the import, as an import in its way to become incorporated with the general mass of property, and denies it the privilege of becoming so incorporated until it shall have contributed to the revenue of the state. It denies to the importer the right of using the privilege which he has purchased from the United States, until he shall have also purchased it from the state. In the last cases, the tax finds the article already incorporated with the mass of property by the act of the importer. He has used the privilege he had purchased, and has himself mixed them up with the common mass, and the law may treat them as it finds them. The same observations apply to plate, or other furniture used by the importer.

So if he sells by auction. Auctioneers are persons licensed by the state, and if the importer chooses to employ them, he can as little object to paying for this service, as for any other for which he may apply to an officer of the state. The right of sale may very well be annexed to importation, without annexing to it, also, the privilege of using the officers licensed by the state to make sales in a peculiar way.

The power to direct the removal of gunpowder is a branch of the police power, which unquestionably remains, and ought to

remain, with the states. If the possessor stores it himself out of town, the removal cannot be a duty on imports, because it contributes nothing to the revenue. If he prefers placing it in a public magazine, it is because he stores it there, in his own opinion, more advantageously than elsewhere. We are not sure that this may not be classed among inspection laws. The removal or destruction of infectious or unsound articles is undoubtedly an exercise of that power, and forms an express exception to the prohibition we are considering. Indeed the laws of the United States expressly sanction the health laws of a state.

The principle, then, for which the plaintiffs in error contend, that the importer acquires a right, not only to bring the articles into the country, but to mix them with the common mass of property, does not interfere with the necessary power of taxation which is acknowledged to reside in the states, to that dangerous extent which the counsel for the defendants in error seem to apprehend. It carries the prohibition in the Constitution no further than to prevent the states from doing that which it was the great object of the Constitution to prevent.

But if it should be proved that a duty on the article itself would be repugnant to the Constitution, it is still argued that this is not a tax upon the article, but on the person. The state, it is said, may tax occupations, and this is nothing more.

It is impossible to conceal from ourselves that this is varying the form without varying the substance. It is treating a prohibition which is general as if it were confined to a particular mode of doing the forbidden thing. All must perceive that a tax on the sale of an article, imported only for sale, is a tax on the article itself.

It is true the state may tax occupations generally, but this tax must be paid by those who employ the individual, or is a tax on his business. The lawyer, the physician, or the mechanic, must either charge more on the article in which he deals, or the thing itself is taxed through his person. This the state has a right to do, because no constitutional prohibition extends to it. So a tax on the occupation of an importer is, in like manner, a tax on importation. It must add to the price of the article, and be paid by the consumer, or by the importer himself, in like manner as a direct duty on the article itself would

be made. This the state has not a right to do, because it is prohibited by the Constitution.

In support of the argument that the prohibition ceases the instant the goods are brought into the country, a comparison has been drawn between the opposite words, export and import. As to export, it is said, means only to carry goods out of the country, so to import means only to bring them into it. But suppose we extend this comparison to the two prohibitions. The states are forbidden to lay a duty on exports, and the United States are forbidden to lay a tax or duty on articles exported from any state. There is some diversity in language, but none is perceivable in the act which is prohibited. The United States have the same right to tax occupations which is possessed by the states. Now, suppose the United States should require every exporter to take out a license, for which he should pay such tax as Congress might think proper to impose; would the government be permitted to shield itself from the just censure to which this attempt to evade the prohibitions of the Constitution would expose it, by saying that this was a tax on the person, not on the article, and that the legislature had a right to tax occupations? Or suppose revenue cutters were to be stationed off the coast for the purpose of levying a duty on all merchandise found in vessels which were leaving the United States for foreign countries; would it be received as an excuse for this outrage, were the government to say that exportation meant no more than carrying goods out of the country, and as the prohibition to lay a tax on imports, or thing imported, ceased the instant they were brought into the country, so the prohibition to tax articles exported ceased when they were carried out of the country?

We think, then, that the act under which the plaintiffs in error were indicted is repugnant to that article of the Constitution which declares, that "no state shall lay any impost or duties on imports or exports."

2. Is it also repugnant to that clause in the Constitution which empowers "Congress to regulate commerce with foreign nations, and among the several states, and with the Indian tribes"?

The oppressed and degraded state of commerce previous to the adoption of the Constitution can scarcely be forgotten. It was regulated by foreign nations with a single view to their own

interests; and our disunited efforts to counteract their restrictions were rendered impotent by want of combination. Congress, indeed, possessed the power of making treaties; but the inability of the federal government to enforce them had become so apparent as to render that power in a great degree useless. Those who felt the injury arising from this state of things, and those who were capable of estimating the influence of commerce on the prosperity of nations, perceived the necessity of giving the control over this important subject to a single government. It may be doubted whether any of the evils proceeding from the feebleness of the federal government contributed more to that great revolution which introduced the present system than the deep and general conviction that commerce ought to be regulated by Congress.

It is not, therefore, matter of surprise that the grant should be as extensive as the mischief, and should comprehend all foreign commerce and all commerce among the states. To construe the power so as to impair its efficacy, would tend to defeat an object in the attainment of which the American public took, and justly took, that strong interest which arose from a full conviction of its necessity.

What, then, is the just extent of a power to regulate commerce with foreign nations, and among the several states?

This question was considered in the case of *Gibbons v. Ogden*, 9 Wheat. 1, in which it was declared to be complete in itself, and to acknowledge no limitations other than are prescribed by the Constitution. The power is co-extensive with the subject on which it acts, and cannot be stopped at the external boundary of a state, but must enter its interior.

We deem it unnecessary now to reason in support of these propositions. Their truth is proved by facts continually before our eyes, and was, we think, demonstrated, if they could require demonstration, in the case already mentioned. * * *

What would be the language of a foreign government, which should be informed that its merchants, after importing according to law, were forbidden to sell the merchandise imported? What answer would the United States give to the complaints and just reproaches to which such an extraordinary circumstance would expose them? No apology could be received, or even offered. Such a state of things would break up commerce.

It will not meet this argument to say that this state of things will never be produced; that the good sense of the states is a sufficient security against it. The Constitution has not confided this subject to that good sense. It is placed elsewhere. The question is, Where does the power reside? not, How far will it be probably abused? The power claimed by the state is, in its nature, in conflict with that given to Congress; and the greater or less extent in which it may be exercised does not enter into the inquiry concerning its existence.

We think, then, that if the power to authorize a sale exists in Congress, the conclusion that the right to sell is connected with the law permitting importation, as an inseparable incident, is inevitable.

If the principles we have stated be correct, the result to which they conduct us cannot be mistaken. Any penalty inflicted on the importer for selling the article, in his character of importer, must be in opposition to the act of Congress which authorizes importation. Any charge on the introduction and incorporation of the articles into and with the mass of property in the country, must be hostile to the power given to Congress to regulate commerce, since an essential part of that regulation, and principal object of it, is, to prescribe the regular means for accomplishing that introduction and incorporation.

The distinction between a tax on the thing imported and on the person of the importer can have no influence on this part of the subject. It is too obvious for controversy that they interfere equally with the power to regulate commerce.

It has been contended that this construction of the power to regulate commerce, as was contended in construing the prohibition to lay duties on imports, would abridge the acknowledged power of a state to tax its own citizens, or their property within its territory.

We admit this power to be sacred; but cannot admit that it may be used so as to obstruct the free course of a power given to Congress. We cannot admit that it may be used so as to obstruct or defeat the power to regulate commerce. It has been observed that the powers remaining with the states may be so exercised as to come in conflict with those vested in Congress. When this happens, that which is not supreme must yield to that which is supreme. This great and universal truth is inseparable

from the nature of things, and the Constitution has applied it to the often interfering powers of the general and state governments, as a vital principle of perpetual operation. It results, necessarily, from this principle that the taxing power of the states must have some limits. It cannot reach and restrain the action of the national government within its proper sphere. It cannot reach the administration of justice in the courts of the Union, or the collection of the taxes of the United States, or restrain the operation of any law which Congress may constitutionally pass. It cannot interfere with any regulation of commerce. If the states may tax all persons and property found on their territory, what shall restrain them from taxing goods in their transit through the state from one part to another, for the purpose of reëxportation? The laws of trade authorize this operation, and general convenience requires it. Or what should restrain a state from taxing any article passing through it, from one state to another, for the purpose of traffic? or from taxing the transportation of articles passing from the state itself to another state for commercial purposes? These cases are all within the sovereign power of taxation, but would obviously derange the measures of Congress to regulate commerce and affect materially the purpose for which that power was given. * * *

We think there is error in the judgment of the Court of Appeals of the State of Maryland. * * *

The judgment is to be

Reversed. * * *

THOMPSON, J., dissented.

CHAPTER V.

THE PUBLIC USES FOR WHICH TAXES CAN BE LEVIED.

LOAN ASSOCIATION v. TOPEKA.

20 Wallace 655 (U.S.). 1874.

[The city of Topeka under authority of an act of the legislature of Kansas issued one hundred bonds for one thousand dollars each as a donation to a certain iron-works company to encourage it to establish a factory in Topeka. The purpose of the bonds appeared on their face. Plaintiff was a purchaser for value and brought suit on interest coupons in the Circuit Court for the District of Kansas. The defendant demurred, its demurrer was sustained and judgment given in its favor, and the plaintiff brought the case on writ of error to the Supreme Court of the United States.]

MILLER, J., delivered the opinion of the court.

Two grounds are taken in the opinion of the circuit judge and in the argument of counsel for defendant, on which it is insisted that the section of the statute of February 29, 1872, on which the main reliance is placed to issue the bonds, is unconstitutional.

The first of these is, that by § 5 of article 12 of the constitution of that state it is declared that provision shall be made by general law for the organization of cities, towns, and villages; and their power of taxation, assessment, borrowing money, contracting debts, and loaning their credit, shall be so restricted as to prevent the abuse of such power.

The argument is that the statute in question is void because it authorizes cities and towns to contract debts, and does not contain any restriction on the power so conferred. But whether the statute which confers power to contract debts should always contain some limitation or restriction, or whether a general restriction applicable to all cases should be passed, and whether in the absence of both the grant of power to contract is wholly void, are questions whose solution we prefer to remit to the state

courts, as in this case we find ample reason to sustain the demurrer on the second ground on which it is argued by counsel and sustained by the circuit court.

That proposition is that the act authorizes the towns and other municipalities to which it applies, by issuing bonds or loaning their credit, to take the property of the citizen under the guise of taxation to pay these bonds, and use it in aid of the enterprises of others which are not of a public character, thus perverting the right of taxation, which can only be exercised for a public use, to the aid of individual interests and personal purposes of profit and gain.

The proposition as thus broadly stated is not new, nor is the question which it raises difficult of solution.

If these municipal corporations, which are in fact subdivisions of the state, and which for many reasons are vested with quasi-legislative powers, have a fund or other property out of which they can pay the debts which they contract, without resort to taxation, it may be within the power of the legislature of the state to authorize them to use it in aid of projects strictly private or personal, but which would in a secondary manner contribute to the public good; or where there is property or money vested in a corporation of the kind for a particular use, as public worship or charity, the legislature may pass laws authorizing them to make contracts in reference to this property, and incur debts payable from that source.

But such instances are few and exceptional, and the proposition is a very broad one, that debts contracted by municipal corporations must be paid, if paid at all, out of taxes which they may lawfully levy, and that all contracts creating debts to be paid in future, not limited to payment from some other source, imply an obligation to pay by taxation. It follows that in this class of cases the right to contract must be limited by the right to tax, and if in the given case no tax can lawfully be levied to pay the debt, the contract itself is void for want of authority to make it.

If this were not so, these corporations could make valid promises, which they have no means of fulfilling, and on which even the legislature that created them can confer no such power. The validity of a contract which can only be fulfilled by a resort to taxation depends on the power to levy the tax for that purpose.

It is, therefore, to be inferred that when the legislature of the state authorizes a county or city to contract a debt by bond, it intends to authorize it to levy such taxes as are necessary to pay the debt, unless there is in the act itself, or in some general statute, a limitation upon the power of taxation which repels such an inference.

With these remarks and with the reference to the authorities which support them, we assume that unless the legislature of Kansas had the right to authorize the counties and towns in that state to levy taxes to be used in aid of manufacturing enterprises, conducted by individuals, or private corporations, for purposes of gain, the law is void, and the bonds issued under it are also void. We proceed to the inquiry whether such a power exists in the legislature of the state of Kansas.

We have already said the question is not new. The subject of the aid voted to railways by counties and towns has been brought to the attention of the courts of almost every state in the Union. It has been thoroughly discussed and is still the subject of discussion in those courts. It is quite true that a decided preponderance of authority is to be found in favor of the proposition that the legislatures of the states, unless restricted by some special provisions of their constitutions, may confer upon these municipal bodies the right to take stock in corporations created to build railroads, and to lend their credit to such corporations. Also to levy the necessary taxes on the inhabitants, and on property within their limits subject to general taxation, to enable them to pay the debts thus incurred. But very few of these courts have decided this without a division among the judges of which they were composed, while others have decided against the existence of the power altogether.

In all these cases, however, the decision has turned upon the question whether the taxation by which this aid was afforded to the building of railroads was for a public purpose. Those who came to the conclusion that it was, held the laws for that purpose valid. Those who could not reach that conclusion held them void. In all the controversy this has been the turning point of the judgments of the courts. And it is safe to say that no court has held debts created in aid of railroad companies, by counties or towns, valid on any other ground than that the purpose for which the taxes were levied was a public use, a purpose or object

which it was the right and the duty of state governments to assist by money raised from the people by taxation. * * *

We have referred to this history of the contest over aid to railroads by taxation, to show that the strongest advocates for the validity of these laws never placed it on the ground of the unlimited power in the state legislature to tax the people, but conceded that where the purpose for which the tax was to be issued, could no longer be justly claimed to have this public character, but was purely in aid of private or personal objects, the law authorizing it was beyond the legislative power, and was an unauthorized invasion of private right.

It must be conceded that there are such rights in every free government beyond the control of the state. A government which recognized no such rights, which held the lives, the liberty, and the property of its citizens subject at all times to the absolute disposition and unlimited control of even the most democratic depository of power, is after all but a despotism. It is true it is a despotism of the many, of the majority, if you choose to call it so, but it is none the less a despotism. It may well be doubted if a man is to hold all that he is accustomed to call his own, all in which he has placed his happiness, and the security of which is essential to that happiness, under the unlimited dominion of others, whether it is not wiser that this power should be exercised by one man than by many. The theory of our governments, state and national, is opposed to the deposit of unlimited power anywhere. The executive, the legislative, and the judicial branches of these governments are all of limited and defined powers.

There are limitations on such power which grow out of the essential nature of all free governments. Implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name. No court, for instance, would hesitate to declare void a statute which enacted that A and B, who were husband and wife to each other, should be so no longer, but that A should thereafter be the husband of C, and B the wife of D. Or which should enact that the homestead now owned by A should no longer be his, but should henceforth be the property of B.

Of all the powers conferred upon government, that of taxation is most liable to abuse. Given a purpose or object for which taxation may be lawfully used, and the extent of its exercise is

in its very nature unlimited. It is true that express limitation on the amount of tax to be levied or the things to be taxed may be imposed by constitution or statute, but in most instances for which taxes are levied, as the support of government, the prosecution of war, the national defense, any limitation is unsafe. The entire resources of the people should in some instances be at the disposal of the government.

The power to tax is, therefore, the strongest, the most pervading of all the powers of government, reaching directly or indirectly to all classes of the people. It was said by Chief Justice Marshall, in the case of *McCulloch v. The State of Maryland*, 4 Wheaton 431, that the power to tax is the power to destroy. A striking instance of the truth of the proposition is seen in the fact that the existing tax of ten per cent., imposed by the United States on the circulation of all other banks than the national banks, drove out of existence every state bank of circulation within a year or two after its passage. This power can as readily be employed against one class of individuals and in favor of another, so as to ruin the one class and give unlimited wealth and prosperity to the other, if there is no implied limitation of the uses for which the power may be exercised.

To lay with one hand the power of the government on the property of the citizen, and with the other to bestow it upon favored individuals to aid private enterprises and build up private fortunes, is none the less a robbery because it is done under the forms of law and is called taxation. This is not legislation. It is a decree under legislative forms.

Nor is it taxation. A "tax," says Webster's Dictionary, "is a rate or sum of money assessed on the person or property of a citizen by government for the use of the nation or state." "Taxes are burdens or charges imposed by the legislature upon persons or property to raise money for public purposes." Cooley, *Constitutional Limitations*, p. 479.

Coulter, J., in *Northern Liberties v. St. John's Church*, 13 Pennsylvania State 104, says, very forcibly: "I think the common mind has everywhere taken in the understanding that taxes are a public imposition, levied by authority of the government for the purpose of carrying on the government in all its machinery and operations—that they are imposed for a public purpose."

We have established, we think, beyond cavil that there can be no lawful tax which is not laid for a public purpose. It may not be easy to draw the line in all cases so as to decide what is a public purpose in this sense and what is not. * * *

Judgment affirmed.

CLIFFORD, J., delivered a dissenting opinion.





